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COURTS OF LAST RESORT

IN THE SUPREME COURT OF THE STATE OF NEW YORK

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By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXIV.

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VOL. LXIV.

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AMERICAN STATE REPORTS.

VOL. LXIV.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SPRAGUE v. NATIONAL BANK OF AMERICA.

[172 ILLINOIS, 149.]

CORPORATIONS—GIVING STOCK FOR PROPERTY—VALUE—A corporation, organized under the laws of the state of Illinois may, by agreement, issue its shares of capital stock in payment for property of such character as it may lawfully acquire, and may agree with the subscribers as to the value of such property, but the agreement, to be valid as a contract, must be made in good faith, and in the exercise of judgment fairly and honestly directed.

CORPORATIONS—VALIDITY OF AGREEMENT TO ABANDON CORPORATION IN ONE STATE AND TO CREATE A NEW ONE, WITH ITS ASSETS, IN ANOTHER.—If the shareholders of a foreign corporation, such as a cable railway company of California, find the company in an embarrassed financial condition, and seek to create a corporation in the state of Illinois, under an agreement that the new corporation shall have the same amount of capital stock, that it shall assume the obligations of the old company, and that the property of the latter shall be transferred, by an exchange of stock, to the new corporation, at an agreed price, in excess of its value, but equal in amount to the capital stock of each company, such agreement has no effect to fix the price or value of such property, where the entire stock of the new corporation has been exchanged for the stock of the old company, share for share, without reference to the value of the property represented by such shares, giving to each shareholder the same number of shares in the new corporation that he had in the old; and such transaction does not constitute a contract of bargain and sale. The shareholders cannot thus abandon the old corporation, and relieve themselves of their statutory liability to pay its corporate debts, and yet hold and retain such property as stockholders of the new corporation.

CORPORATIONS—BURIAL OF, IN ONE STATE AND RESURRECTION OF, IN ANOTHER—TRANSFER OF PROPERTY—EXCHANGE OF SHARES—TO WHAT EXTENT STOCK WILL BE DEEMED PAID.—If an Illinois corporation issues its shares

of stock in exchange for the property and effects of a foreign corporation, having the same amount of capital stock, and assumes the latter's obligations, under an agreement that the property shall be received at an agreed price, in excess of its value, and equal in amount to the capital stock of each corporation, the stock of the Illinois company will, as against creditors, be deemed paid only to the extent that the fair actual value of the property received exceeds the amount of the indebtedness assumed.

CORPORATIONS—UNPAID STOCK—LIABILITY OF STOCKHOLDER.—Under the statute of Illinois, each stockholder of a corporation is answerable for its debts to the extent of the amount unpaid upon his stock, and he cannot escape such liability by an assignment of his stock.

CORPORATIONS—LIABILITY OF PURCHASER OR ASSIGNEE OF UNPAID STOCK WITHOUT NOTICE.—If stock has been issued as fully paid, and a purchaser or assignee thereof acquires it in good faith, and without notice that it has not been fully paid, he is not answerable to the creditors of the corporation for the balance unpaid.

CORPORATIONS—LIABILITY OF PURCHASER OR ASSIGNEE OF STOCK WITH NOTICE.—If stock has been issued as fully paid, and a purchaser or assignee thereof acquires it with notice that it has not been fully paid, he is answerable, with the seller or assignor, to the creditors of the corporation, for the balance unpaid.

CORPORATIONS—SUBSCRIPTIONS TO STOCK—RIGHT OF CREDITOR TO ENFORCE.—The right of a creditor, under the Illinois statute, to enforce liability against one who has subscribed for stock in a corporation and has not paid his subscription in full, is not dependent, in any degree, upon the knowledge possessed by the creditor that such subscription was or was not paid in full. If unpaid to the corporation it must be paid to the creditor.

Bill in chancery against Albert A. Sprague and others, appellants. The appellee, the National Bank of America, was a creditor of the railway company mentioned in the opinion.

Green, Robbins & Honore, Edwin Burritt Smith, Wilson, Moore v. McIlvaine, James L. High, Herrick, Allen, Boyesen & Martin, John P. Wilson, and A. W. Green, for the appellants.

Walker & Eddy, Moran, Kraus & Mayer, Winston & Meagher, Edwin Walker, T. A. Moran, and James F. Meagher, for the appellees.

150 **BOGGS, J.** This was a bill in chancery filed by Charles F. Morse, one of the appellees, against the appellants, alleging the insolvency of the Pacific Railway Company, a corporation organized under the general incorporation laws of this state; that said corporation was indebted to him; that the appellants were shareholders of its capital stock and had not paid in full their subscriptions to the capital stock; and the prayer was the

appellants should be made defendants to the bill, and each required to pay his pro rata share of the amount due the complainant, to the extent of the unpaid portion of stock held by each of said defendants. The other appellees are creditors of the said Pacific Railway Company who filed intervening petitions, and thereby came into the case as co-complainants with the said original complainant. The answers of the appellants, in substance, were that the subscriptions to the capital stock of the company had been paid in full. The cause was referred to a master, the proofs taken and reported, and a decree entered that the bill be dismissed for want of equity. The case came by appeal to the appellate court for the first district, and the decree of the circuit court was reversed and the cause remanded, with ¹⁵¹ directions as to the further course to be pursued by the trial court. This is an appeal prosecuted by the defendants to the said bill in chancery to bring the judgment of the appellate court into review in this court.

The Pacific Railway Company was incorporated under the general incorporation laws of the state of Illinois on the twenty-second day of August, 1889, with a capital stock of \$2,500,000, divided into 25,000 shares, of \$100 each. The entire capital stock was subscribed by five of the appellants, to wit, John J. Mitchell, C. B. Holmes, Alexander Geddes, James L. Hough-
teling, and Morton B. Hull, each of whom subscribed for 5,000 shares. No money was paid by any of such subscribers, but the contention of appellants is such subscriptions were paid in full by the transfer of the assets and shares of capital stock of the Los Angeles Cable Railway Company, a corporation organized under the laws of the state of California, to the said Pacific Railway Company, the latter company, as a part of the transaction, assuming to pay the indebtedness of the cable company.

It appeared from the proofs the said cable company was incorporated under the laws of the state of California on the thirteenth day of July, 1887, with authority to construct a cable railway in the city of Los Angeles, California; that its capital stock was fixed at \$2,500,000, divided into 25,000 shares, of \$100 each; that only 650 shares of its capital stock were ever subscribed for to be paid in cash; that the subscribers thereto were as follows: J. F. Crank, 630 shares, and Charles Freeman, S. P. Jewett, S. C. Hubble, and O. J. Hellman, each five shares, who together paid only the sum of \$6,500 on their subscriptions; that on the thirtieth day of July, 1887, the said cable company leased three lines of horse railways in the city of Los

Angeles, at an annual rental of \$10,000 for each line, and by the further terms of the lease assumed to pay the indebtedness of the three lines of horse railways, aggregating the sum of \$90,000; that on the seventh ¹⁵² day of May, 1888, said cable railway company contracted to acquire the capital stock of the said horse railways, paying five shares of its capital stock for each share of stock of the said horse railway companies; that on the fifteenth day of September, 1887, the said cable company executed a mortgage on all its property, including the lines of horse railways, to secure its bonds, in the sum of \$1,500,000, which it designed to place upon the market for sale, and such bonds, amounting in the aggregate to \$836,000, were sold; that in addition to this bonded debt the company had contracted other obligations, aggregating in all more than \$2,000,000; that an assessment on the stockholders sufficient to raise the sum of \$100,000 was levied by the board of directors, to be paid November 1, 1888; that while the affairs of the cable company were thus situated, a committee representing a number if not all, of the appellants visited the city of Los Angeles and bought a large block of the stock of the cable company, paying \$32 per share for each share of the face value of \$100; that the number of shares so purchased does not clearly appear, nor does the record disclose the names of the purchasers, other than appellants Holmes and Mitchell, but it seems well established the purchase was consummated by a committee acting for themselves and others, and that the number of shares secured constituted a controlling interest in the company, and, counsel for appellants say, constituted about three-fourths of the capital stock; that appellants Holmes and Mitchell were elected directors of the cable company January 1, 1889, and appellant Holmes was elected its president February 1, 1889; that the board of directors authorized appellant Holmes, its president, to borrow money for the company for the purpose of paying its floating indebtedness and to defray the expense of extending the lines of the company; that the said Holmes borrowed large sums of money very soon thereafter, the aggregate of such loans reaching the sum of \$400,000 by the 1st of March, ¹⁵³ 1889; that of this amount \$350,000 was applied to the construction of new lines or extending the old lines of the cable company, and the remainder was used in the payment of dividends to the stockholders; that the stock purchased by the Chicago parties, who are appellants here, was held by J. F. Crank, former president of the cable company, to whom it had been issued in exchange

for the stock of certain horse railway companies, under an arrangement with Crank and other owners of the horse railway companies, by which the cable company gave five shares of its stock for each share of horse railway stock, and therefore the amount paid in the purchase of the stock by the said appellants did not reach the treasury of the cable company; that under the laws of the state of California each holder of the cable company stock was made liable for his pro rata portion of the indebtedness of the company; that while the entire capital stock of the cable company, to wit, \$2,500,000, has been issued as fully paid up, the company has only received from its shareholders in cash \$6,500, paid in upon the organization of the company, and \$100,000 assessed and paid November 1, 1888, being the first and only assessment, and had repaid to them \$50,000 out of the sums borrowed by Holmes, the remainder of the stock having been disposed of by the transaction between the cable company and its president and others, who were the owners of the stock of the horse railway companies, wherein five shares of the stock of the cable company were valued as equal to and were exchanged for one share of the stock of the horse railway companies, the cable company, in addition, assuming to pay the indebtedness of the horse railway companies to an amount approximating the sum of \$90,000; that at the opening of the month of August, 1889, the indebtedness of the cable company, floating and bonded, had reached, and probably exceeded, the sum of \$2,000,000, of which amount \$1,264,000 was not bonded but partly due and all soon to mature, and ¹⁵⁴ in view of the fact that under the laws of the state of California each stockholder was personally liable for his pro rata share of the indebtedness of the corporation, a number of those owning and holding shares of its stock, probably thirty to forty in number, including appellant Holmes, its president, and J. F. Crank, its vice-president, came together in the city of Chicago on the fifth day of August, 1889, to confer as to the situation; that the result of their deliberations was that they concluded they could relieve themselves of the liability created by the laws of the state of California by organizing a corporation under the laws of the state of Illinois, having a like capital stock and a like number of shares of stock as the cable company, and transferring the assets and property, rights, and franchises of the cable company to the proposed Illinois corporation, and issuing a like number of shares of stock in the Illinois corporation, to be deemed as paid in full, and exchanging the same with the

holders of the cable company stock share for share, and it was decided an Illinois corporation should be organized and that course pursued; that in pursuance of such conclusion, and for the purpose of carrying it into effect, certain of the appellants who had participated in the meeting of said holders of shares in the cable company, and acting in behalf of the other of said participants, on the ninth day of August, 1889, filed with the secretary of state of the state of Illinois the statement required by section 2 of chapter 32 of the Revised Statutes of Illinois, entitled "Corporations," as the initiatory step in the formation of a corporation in this state, and received license empowering them, as commissioners, to receive subscriptions to the capital stock of a corporation to be called the Pacific Railway Company, to the amount of \$2,500,000, and on the day of August, 1889, they reported that they had obtained subscriptions for the entire amount of the capital stock, and that a meeting of the subscribers had been held, and John J. Mitchell, ¹⁵⁵ Morton B. Hull, Alexander Geddes, James L. Houghteling, and Charles B. Holmes had been elected directors.

It will be observed that all of said persons so selected as directors are appellants, and were stockholders in the cable company, and that Mitchell and Holmes were directors of said cable company and that Holmes was its president. It also appears from the testimony that the only subscribers to the capital stock of the said Pacific company were the said five persons reported as having been selected as directors, each of whom subscribed for 5,000 shares of the capital stock but paid nothing for said stock, and were not to pay anything, but were to simply hold the shares until they should be exchanged for like numbers of shares in the stock of the cable company.

Said subscriptions to the capital stock of the Pacific company having been entered, the said Holmes, as president of the cable company, and the said Holmes, Mitchell, Houghteling, Hull, and Geddes, assuming to act as directors of the Pacific Railway Company, without waiting for the issuance of articles of incorporation, prepared and sent to each stockholder of the cable company the following circular letter:

"Important to Shareholders of the Los Angeles Cable Railway Company.

"Chicago, Ill., August 15, 1889.

"Dear Sir: Every shareholder in any corporation organized under the laws of California is responsible for a pro rata proportion of all indebtedness incurred by the corporation during the

time that he is a stockholder of record therein; nor is the obligation relieved by the sale and transfer of the stock, but he remains, during the life of the corporation, personally liable for such a proportion of the indebtedness incurred while he was a shareholder as the amount of his stock bears to the entire capital stock of the corporation. California is the only state in the Union which has such a peculiar law.

¹⁵⁶ "At a meeting of gentlemen who are stockholders in the Los Angeles Cable Railway Company, and representing a large majority in the stock of that company, held at the Grand Pacific Hotel in this city on the 5th inst., the matter was thoroughly discussed, and it was unanimously resolved that a corporation be organized under the laws of the state of Illinois, with \$2,500,000 of capital stock, being the same amount of the capital stock of the Los Angeles Cable Railway Company, and that all holders of shares in the latter company be requested to exchange their shares for an equal number in the Illinois corporation. The capital stock of the latter company will be full paid, inasmuch as it holds as its assets the capital stock of the Los Angeles Cable Railway Company, turned into it at the agreed price of \$2,500,000. In this way the Illinois company, as a corporation, becomes responsible under the laws of California, and not the individual holders of the Los Angeles stock, and the individual shareholders will in this way be relieved of personal liability, which, though it may be regarded by some as remote, does nevertheless exist, and in case many years from now, after the present stockholders have disposed of their holdings, the road shall fall into incompetent hands, or into the ownership of those who might not properly guard its indebtedness, the tangible property of the company might be sold for a much less amount than would cover its bonded indebtedness, and in that case the present shareholders would be personally responsible for their pro rata amount of such deficiency. It is proposed to pay off, out of the proceeds from the sale of bonds of the new company, hereinafter described, all indebtedness for construction and equipment, leaving absolutely no liability, actual or prospective, resting upon the stockholders who exchange their stock as suggested above.

"Another difficulty has also been encountered, namely: When the trust deed was issued by the former owners of the road it was believed that \$1,500,000—the limit of said ¹⁵⁷ trust deed—would be sufficient to construct the twenty miles of cable road which is now almost finished; but the actual cost of such con-

struction will be about \$2,000,000, and in a city which has grown from 10,000 people eight years ago to some 88,000 people at the present time, it is almost certain that additional cars, and probably extensions of lines, will be required in the near future, and no provisions whatever were made for this under the trust deed heretofore issued. Consequently, at the meeting held on the 5th inst., it was the unanimous opinion of the gentlemen present that when the new corporation should be organized, an issue of \$2,500,000 of bonds should be provided for, secured by suitable trust deed, \$836,000 of these bonds not to be issued by the trustee, except for the purpose of taking up and canceling an equal amount of the bonds of the Los Angeles Cable Railway Company, that amount being all of the bonds of that company which have been sold, and that, after reserving the said \$836,000 in the hands of the trustee, bonds be issued for an amount sufficient to pay the cost of constructing the cable road and properly equipping it, and the balance of the bonds, amounting in round numbers to \$500,000, be not issued, except at such times and in such amounts as in the judgment of the board of directors of the new company shall be necessary to meet the payment of such additional equipment and extensions as the interest of the new company shall render desirable.

"It is believed that every shareholder of the Los Angeles Cable Railway Company will see that it is for his interest to join with the majority in carrying out this arrangement, as by so doing he retains precisely the same relation to the property that he now does. He does not lose anything whatever, but is at the same time relieved of personal liability in the premises. If any shareholder does not see it to be for his interest to join in this arrangement, the only method of paying the present floating indebtedness (which, upon the completion of the construction now in hand, on or about the first day of September, 1888 will reach the sum of \$1,200,000) will be to follow the method prescribed by the laws of California, namely, to assess the stock a sufficient amount to pay the indebtedness. This assessment will be paid by the new corporation for all those persons who shall have exchanged their stock for stock in the Illinois corporation, and persons holding stock in the Los Angeles Cable Railway Company, and not exchanged for stock in the Illinois company, will be obliged to pay the assessment on their stock, or the same will be sold to pay said assessment, according to the statute in such cases made and provided.

"In pursuance of the recommendation made at the meeting

as indicated above, a new corporation has been organized under the laws of the state of Illinois, entitled 'The Pacific Railway Company,' with the following named persons as directors for the first year, viz: John J. Mitchell, Morton B. Hull, Alexander Geddes, James L. Houghteling, and Charles B. Holmes.

"In this connection it may be of interest to add that the construction has been pushed with great energy, and the entire plant will be finished about the 1st of September, and it is fully believed that the expectations entertained of the property from the beginning (that the earnings, after paying all operating expenses and interest charges, will be sufficient to pay handsome dividends) will be realized. The first section of cable line, extending from Grand avenue and Seventh street to the center of the city, was opened on the eighth day of June last, and has operated continuously ever since without a single moment's delay, and without requiring any change to be made in machinery or other parts of the plant. The second section, running from the center of the city to Boyle Heights, was opened to the public on the third day of the present month, and is operating with equal satisfaction. The balance of the road, including the extensions, is almost completed, and will be in the very best condition to take care of the vast volume of travel which it is believed ¹⁵⁹ the road will secure, not only from the present residents of Los Angeles, but from the multitude of visitors who will make that city their winter home.

"If the plan outlined above meets your approval, you are requested to forward to the undersigned, at your earliest convenience, the certificates of stock held by you in the Los Angeles Cable Railway Company, indorsed in blank on the back, and upon receipt of the same there will be forwarded to you certificates of stock in the new corporation for the same number of shares as was surrendered by you in the old. If any point in the foregoing statement is not made sufficiently clear we shall be most happy to answer any inquiries you may be pleased to make.

Respectfully yours,

"C. B. HOLMES, President, etc.

"We concur in the foregoing:

"JOHN J. MITCHELL,

"JAMES L. HOUGHTELING,

"MORTON B. HULL,

"ALEXANDER GEDDES,

"CHARLES B. HOLMES,

"Directors Pacific Railway Co."

The certificate of incorporation of the Pacific Railway Company was issued on the twenty-second of August, 1889, and on the following day the persons whose names appeared as directors in the circular letter which was issued on the 15th of August, some eight days before the company was organized, were named as directors, and they selected as president of the said Pacific company said C. B. Holmes, who was at the same time president of said cable company, and by resolution directed their said president, as president, to enter into negotiations with the cable railway company, of which he was also president, for the transfer of the property, assets, and franchises of the cable company to the Illinois corporation, in accordance with the scheme adopted at the meeting of the stockholders of the cable company at Chicago on the fifth day ¹⁶⁰ of August, as hereinbefore set forth. Holmes took no steps to exercise the authority to negotiate with the cable company, thus conferred upon him, until the seventh day of October, 1889, but in the mean time stockholders of the cable company, or the greater number of them, had responded to the circular letter hereinbefore set out, and the greater part of the stock of the two companies had been exchanged.

On the said seventh day of October, 1889, Holmes, as president of the Illinois corporation, made a formal proposition, as authorized by the board of directors of the Illinois corporation, for the transfer of the assets, property, and franchises of the cable company in exchange for stock in the Illinois corporation, the obligations and indebtedness of the cable company to be assumed by the said Illinois corporation. The proposition was accepted by telegram on the day it was received or on the following day. The plan of exchanging the stock of the two companies was carried into execution, and instruments were at once executed purporting to transfer the assets, property, and franchises of the cable company to the Pacific company, but the control and management of the cable and horse railways in Los Angeles were retained by the officials of the California corporation, and the earnings paid into its treasury, until some time in the following April.

The Pacific Railway Company became insolvent, and George M. Bogue was appointed receiver on the nineteenth day of January, 1891, and this proceeding was instituted by the appellees, who are creditors of the Pacific Railway Company, against the appellants, who are, as it is alleged, holders and owners of its stock, to enforce liability under the provisions of section 25 of

chapter 32 of the Revised Statutes, entitled "Corporations," to require the said appellants to pay his and their pro rata share of the debts due from the said Pacific Railway Company to the extent the stock held by appellants was unpaid.

¹⁶¹ The judgment of the appellate court is as follows: "On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error. Therefore, it is considered by the court that for that error, and others, in the record and proceedings aforesaid, the decree of the circuit court of Cook county in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county, with directions to cause to be taken an account of the debts owing by the Pacific Railway Company, and to whom, and of the fair actual value of the property the company received for its stock at the time the said property was so received, and treat the stock as paid to the extent of such value, and when such account is taken, to enter a decree charging the stockholders, respectively, with their pro rata share of such debts of the company to the extent of the unpaid, if any, portion of their stock, respectively, after exhausting the assets of the company, as provided in section 25 of an act concerning corporations, approved April 18, 1872."

The proposition first advanced in behalf of the appellants in support of their contention the judgment of the appellate court should be reversed is, that the cable company contracted to sell, and sold, its assets of every description to the Pacific company, and the value of the property and assets so sold was fixed by the terms and conditions of the contract of sale entered into between the corporate bodies, and that, by force of the obligations of that contract, the Pacific company became bound to accept, and did accept, the net assets, property, franchises, etc., of the cable company in full payment of the ¹⁶² shares of its capital stock issued to and held by the appellants and other holders of shares of the stock of the cable company, and that the Pacific company, being so bound, the creditors of that company are also likewise bound by the contract between said corporate bodies, unless said creditors affirmatively establish the contract was fraudulent and void. The appellants insist proof

of fraud is wanting, and that therefore the appellate court erred in directing that the actual value of the property received by the Pacific company should be ascertained by proof, and the stock issued by the Pacific company be deemed paid only to the extent of the actual value of said assets, property, and effects of the cable company.

We entertain no doubt but that a corporation organized under the laws of Illinois may issue shares of its capital stock in payment for property of such character as it may lawfully possess and use, and may agree with the subscriber as to the value of such property, provided the agreement is made in good faith and in the exercise of judgment fairly and honestly directed. We do not, however, think the transaction which resulted in the transfer of the assets and effects of the cable company to the Pacific company had any effect to fix the price or value of such assets and effects, or that it constituted a contract of bargain and sale. The facts disclosed are, that the holders of shares of stock in the cable company, because of the embarrassed financial condition of the company and of the provisions of the statutes of the state of California making them personally liable for the obligations of the company in proportion as their shares were to the capital stock, were much concerned, and feared heavy financial loss would be entailed upon them. Moved by such apprehensions, a number of such owners of shares of stock, among them the president, vice-president, and several members of the board of directors of the corporation, held a meeting in the city of Chicago on the fifth day of August, 1889, for the purpose of taking counsel together ¹⁶³ as to the situation, and of falling upon or devising, if possible, some plan or course of action by which they might free themselves from the obligations imposed upon them by the laws of the state of California. The statutes of Illinois do not cast upon holders of stock in corporations created in this state the obligation to pay the debts of the corporation, as do the laws of California, and it occurred to them the creation of a corporation in Illinois, and the transfer of the property and effects of the cable company to it by means of an exchange of the stock of the cable company for stock of the proposed Illinois company, would enable them to abandon the California corporation and relieve themselves of the statutory liability resting upon them as stockholders in a corporation organized under the laws of that state, while they would hold and retain such property and effects as stockholders in the Illinois Company. They proceeded without delay to carry

the scheme into execution, the first step being the issuance of the circular letter hereinbefore set out. On the ninth day of August certain of their number, including the president of the cable company and at least one member of its board of directors, applied to the secretary of state of the state of Illinois for a license authorizing them, as commissioners, to receive subscriptions to the capital stock of the proposed new corporation, to be called the Pacific Railway Company, and immediately on receipt of such license such persons subscribed for the entire capital stock, which they fixed at the same sum and divided into the same number of shares as the capital stock of the California corporation. They paid nothing upon such subscriptions. The subscriptions were nominal, in fact, and only for the purpose of accomplishing a pretended compliance with the statute, in order to obtain a speedy organization of the corporation. Without waiting, however, for the actual organization of the Illinois corporation, the same persons who were acting as commissioners to secure subscription to its capital stock, one of whom ¹⁶⁴ was the president of the cable company, another a director in that company, and all shareholders therein, prepared and sent to each holder of stock in the California corporation the circular letter hereinbefore set out, the purpose of which was to hasten the surrender of the stock in the California company, in order that it might pass out of existence before some act of insolvency occurred which would fasten upon its stockholders liability to respond to its creditors as provided by the laws of that state. The Illinois corporation was organized August 23, 1889. The board of directors, on the day the organization was perfected, elected as president of the company one C. B. Holmes, who was also president of the California company, and authorized him to negotiate with the California company for the purchase of its assets and property, to be paid for in shares of the stock of the Illinois corporation, and the corporate functions of the Illinois company were at once employed in the discharge of the sole mission and purpose of its creation, namely, to secure the substitution of its stock for the stock of the cable company. The efforts in this direction were pursued with such vigor that the greater portion of the stock in the cable company was exchanged for stock in the Illinois company before the president of the Illinois company (he being at the time president of the cable company) exercised the authority vested in him by the board of directors to submit a proposition to the cable company for the purchase, by way of

exchange of shares of stock, of its assets and property, but the proposition for such exchange was finally made by letter on the seventh day of October, 1889, and was accepted by telegram on the same day or the next day after the letter reached the cable company. The entire stock of the Pacific company was issued and exchanged for the stock of the cable company, though the lines of street railway in Los Angeles remained in the control of the officers of the cable company and the earnings thereof were paid into the treasury of ¹⁶⁵ the cable company for a period of more than five months after the transaction, which counsel for appellants contend was a contract of bargain and sale, had been fully executed.

It is perfectly clear this transaction is lacking in the material elements of a contract of purchase and sale. In the eye of equity the stockholders of the cable company were the owners of the property of the company, and the corporation but a mere fiction, created for the purpose of representing as a collective body the individual corporators. These corporators did not part, and did not intend to part, with any right of ownership by force of the transaction relied upon to constitute a sale. After the completion of the transaction these corporators or stockholders remained owners of the same interest and right in the same property which they possessed before its inception, and it is wholly immaterial, in an equitable point of view, that such right and interest therein are held under a different certificate of stock from that which formerly constituted the evidence of their ownership. The real purpose was to abandon the California corporation as the representative for them, collectively, and to create another artificial body—an Illinois corporation—to serve them in that capacity in the future. To paraphrase what was well said when a similar question was before the court of appeals of the state of New York (*People v. Ballard*, 134 N. Y. 269), it was a corporate burial in California for resurrection in Illinois. The resurrection, however, involved that measure of personal liability which the statute of Illinois attaches to the ownership of shares of the capital stock of a corporation created under the laws of Illinois. This liability is created by section 8 of chapter 32 of the Revised Statutes, which provides "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him." The Pacific company received the property and effects of the cable ¹⁶⁶ company and assumed to pay the obligations of the latter company. An

accounting as to the value of such property and effects and of its obligations to its creditors will determine the net value of the property and effects received by the Pacific company. In so far as the property and effects of the cable company exceeded the indebtedness of the company, the stock in the Pacific company should be deemed paid. Therefore, the position of each appellant who held stock interest in the California corporation is, that instead thereof he is the holder of stock in the Illinois corporation paid up to the extent of the net value of his interest in the property and effects which were transferred from the California corporation to its successor, the Illinois corporation, and to that extent only, and therefore liable to the creditors of the latter corporation to the extent his stock is unpaid.

It is idle to contend the value of the property and effects so transferred was fixed and settled by the transaction which is denominated a sale. There was no sale, but simply an agreement entered into by and between holders of the stock of the cable company that they would transfer their stock interest to themselves, as stockholders in the Pacific company, and that the latter corporation should be their business representative. In pursuance of this agreement the parties thereto caused the Pacific Railway Company to be created. They were the only subscribers to its stock, and its officers and directors were of their body and chosen for the express purpose of acting in their behalf. From every equitable point of view the Pacific company was but the representative of the stockholders of the cable company, and the terms and conditions of the transfer but such as they agreed upon among themselves, and of no further binding force. The value of the property owned by them as a collective body, the title whereof they transferred to the Illinois corporation, was wholly unimportant, and did not enter into their consideration, the only concern being ¹⁶⁷ that the relative interests of the individual stockholders therein should be preserved. That was accomplished by giving the Illinois corporation the same capital stock as had the California company, and dividing it into shares of the same face value, and exchanging the shares of the two companies, share for share, without reference to the value of the property represented by such shares, giving to each shareholder the same number of shares in the new corporation that he had had in the old.

The rule of liability we have declared, it will be observed, is that which attaches to those who were owners of the stock in the cable company which they exchanged for shares in the Pacific

company. The same rule will also apply to any purchaser or assignee of the shares in the Pacific company who acquired the shares with notice of the facts relative to the mode and manner or purpose of its issue. The rule as to an assignee who purchased in good faith and without notice is laid down in *Coleman v. Howe*, 154 Ill. 458, 471, 45 Am. St. Rep. 133, as follows: "A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid, and he has acquired the same in good faith, and without notice that it has not been fully paid."

Where stock which has not been fully paid, but which was issued as paid-up stock, is sold to a bona fide purchaser without notice that it is not fully paid, the remedy of the creditor is preserved against the assignor of such stock by the provisions of section 8 of chapter 32 of the Revised Statutes, entitled "Corporations," which provides no assignor of unpaid stock shall be released from his obligation to the creditors by reason of his assignment of the stock. Hence, if any of the owners of stock in the Pacific company who obtained the same in exchange for cable company stock held by them, assigned the same to an innocent purchaser or assignee, the obligation of such assignor, under the statute, to the creditors of the Pacific ¹⁶⁸ company remains in as full force as though he still owned the stock, and if his assignee received the stock with notice that it was, as we have held, in part unpaid, both assignor and assignee are, by the force and effect of the provisions of said section 8, liable to respond to creditors. Nor is this liability in anywise affected by the fact the creditor knew, or did not know, when he extended credit to the corporation, that the stock was in part unpaid. The liability of the stockholder is established by the statute for the purpose of securing to the creditor the benefit of the entire fund which, in the contemplation of the statute, will be created by subscriptions to the capital stock of the corporation. The right of a creditor to avail himself of this liability of a stockholder arises out of the fact the stockholder has not, as the statute requires, paid the full amount of his subscription to the capital stock of the corporation, and the right is in nowise impaired by the fact that the creditor knew, or did not know, the stockholder was in default.

Counsel for the appellants cite adjudicated cases wherein it has been held that where subscriptions to the capital stock of a corporation was paid in property which was received by the corporation as in full payment of the subscription to its capital

stock, such payment is, so far as the corporation is concerned, payment in full, and the corporation can enforce no further demand against the stockholder, and that a creditor of the corporation stands in no different position from the corporation, unless a fraud was committed on him by the arrangement between the corporation and the stockholder which operated to deprive him of some security upon which he had relied when he extended credit to the corporation; and also an expansion of the same doctrine, that if the creditor knew, when he gave credit to the corporation, the stock had been issued as full paid in payment for property purchased by the corporation, or had means of acquiring such knowledge, the creditor would stand in no ¹⁶⁹ better position than the corporation, and could only enforce liability against the stockholder in case the corporation could recover from such stockholder. We think the doctrine of these cases has no application as against the express declaration of our statute that the creditor shall be invested with a right to recover if the stock has not been fully paid. The legislative intent was, that any amount unpaid upon subscription to the capital stock of a corporation should constitute a fund, to which a creditor of the corporation might resort to obtain satisfaction of his demand against the corporation. We hold, therefore, that under our statute the right of a creditor to enforce liability against one who has subscribed for stock in a corporation and has not paid his subscription in full, is not dependent, in any degree, upon the knowledge possessed by the creditor that such subscription was or was not paid in full. If unpaid to the corporation it must be paid to the creditor.

The judgment of the appellate court that the decree of the circuit court of Cook county be reversed and that the cause be remanded to said circuit court is affirmed, but its directions to said circuit court are modified, and the said circuit court is directed to cause to be taken an account of the debts owing by the Pacific Railway Company, and to whom, and of the fair actual value of the property the company actually received for its stock at the time the said property was so received, and of the indebtedness of the cable company which the Pacific company became liable to pay, and treat the stock as paid to the extent such value of the property received exceeded the sum of the indebtedness assumed, and when such account is taken, to enter a decree charging the appellants who obtained stock in the Pacific Railway Company in exchange for stock in the Los Angeles Cable Railway Company, and those, if any, who obtained stock in the Pa-

cific Railway Company by assignment from former owners, having at the time notice that such stock was ¹⁷⁰ issued by the Pacific Railway Company in exchange for such stock in the Los Angeles Cable Railway Company, or notice that it was not in fact paid in full by the subscribers, respectively, with their pro rata share of such debts of the company to the extent of the unpaid, if any, portion of their stock, respectively, after exhausting the assets of the company, as provided in section 25 of the act concerning corporations, approved April 18, 1872. The costs in this court will be adjudged against the appellants.

Judgment affirmed.

CORPORATIONS—EXCHANGE OF STOCK FOR PROPERTY—UNPAID STOCK.—A corporation may sell its property to another corporation: Note to *Austin v. Tecumseh Nat. Bank*, 59 Am. St. Rep. 548; and a corporation may receive, in payment of stock subscriptions, property which it may lawfully purchase, which is suitable and applicable to the purposes for which it was organized; but it must be taken in good faith, and at its fair bona fide value. Unless entire good faith is exercised in valuing property taken by the corporation for stock, the stockholders must respond to the creditors of an insolvent corporation for the par value, less the actual value of the property taken in exchange for it: Notes to *Buck v. Ross*, 57 Am. St. Rep. 68; *Shields v. Clifton Hill Land Co.*, 45 Am. St. Rep. 725; *Wishard v. Hansen*, 61 Am. St. Rep. 242. A stockholder is liable until his stock is fully paid up: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133. He is liable for unpaid stock, whether he is a purchaser or an original subscriber; and cannot escape liability for existing debts by transferring his stock: Note to *Buck v. Ross*, 57 Am. St. Rep. 70. A purchaser of stock which has not been fully paid up, or which has been paid for in property at a gross over-valuation, who has notice of the facts, is liable to the same extent as the party who transfers it to him: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133; note to *Wishard v. Hansen*, 61 Am. St. Rep. 242. Creditors have a right to presume that stock subscribed has been, or will be, paid up, and if it is not, a court of equity will, at their instance, require it to be paid: Note to *Buck v. Ross*, 57 Am. St. Rep. 67. A bona fide purchaser for value, and without notice, of stock issued by a corporation as paid up cannot be held liable on such stock in any way, even though the stock was not actually paid up as represented. Such a purchaser has a right to rely on the representation of the corporation that the stock is paid up: *Cook on Stocks and Stockholders*, 3d ed., sec. 50.

HARTFORD DEPOSIT COMPANY v. SOLLITT.

[172 ILLINOIS, 222.]

ELEVATORS—CARRIERS OF PASSENGERS.—Persons who operate elevators for raising and lowering persons from one floor to another, in buildings, are carriers of passengers, and subject to the rules governing such carriers.

ELEVATORS—CARE REQUIRED OF OPERATORS.—Those who operate passenger elevators must use extraordinary care in and about their operation to avoid injury to the passengers.

ELEVATORS—FALL OF, AS EVIDENCE OF NEGLIGENCE.—The fact of the falling of a passenger elevator is evidence tending to show want of care in its management, or that it was out of repair, or faultily constructed.

ELEVATORS—FALL OF—LIABILITY FOR.—If a passenger elevator, through faulty construction or management, or neglect in allowing it to remain out of repair, falls, and injures a passenger, the operator is answerable in damages.

NEGLIGENCE—DAMAGES—QUESTIONS OF FACT.—Whether an injury was received as charged in the declaration, and the amount of damage, are questions of fact.

APPEAL—REVIEW OF FACTS.—A PEREMPTORY INSTRUCTION to find for the defendant, when asked as one of a series, does not authorize an appellate court to review the facts.

TRIAL—WHAT EVIDENCE MAY BE EXCLUDED.—It is not error to exclude evidence which does not tend to enlighten the jury upon any question of fact in issue.

Action to recover damages for personal injuries. There was a judgment for the plaintiff, and the company appealed.

Burnham & Baldwin, for the appellant.

Thomas Bates and Seymour Edgerton, for the appellee.

223 PHILLIPS, C. J. Appellee leased offices on the tenth floor of a building owned by appellant at the corner of Dearborn and Madison streets, in the city of Chicago. On May 19, 1893, appellee took an elevator at the tenth floor for the purpose of descending to the first floor. On leaving the eighth floor with about twelve passengers the car could not be controlled by the machinery, and it dropped rapidly from about the sixth floor to within four feet of the ground floor, when the further descent was arrested by the safety devices which clamped the guides on either side of the shaft. Appellee was injured by this fall and brought suit in the circuit court of Cook county, where a verdict was returned for four thousand dollars damages, and a motion for new trial was made and denied and judgment entered on the verdict. To the overruling of the motion for a new trial and the entering of judgment the defendant excepted. An appeal was prosecuted to the appellate court for the first district, where that

judgment was affirmed. The cause is brought to this court on appeal.

The first point made by the appellant is, that an instruction given for the plaintiff was error because it stated a proposition, under which a recovery could be had, which was not based on any matter charged by the declaration. Two counts were contained in the declaration. By the first count it was charged that through the carelessness, negligence, and unskillfulness of the defendant and its servant the elevator slipped in the shaft in which it ran, and fell from the eighth floor to the ground floor. The second count charged that the defendant did not use due and proper care that the plaintiff should be ²²⁴ safely carried, and did not have all the most improved and proper appliances attached to prevent a too rapid fall of the elevator, and did not have said appliances in good and proper order and condition for performing their work. The only instruction asked by the plaintiff was: "The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff, on or about the nineteenth day of May, 1893, was rightfully in an elevator in the possession of and operated by the defendant and situated in the defendant's building, for the purpose of being carried thereby from one of the upper floors of defendant's said building to the ground floor thereof; and if you further believe, from the evidence, that while the plaintiff was so in such elevator and in the exercise of reasonable and ordinary care on his part, said elevator, owing to the negligent and faulty construction thereof, or owing to the negligence and carelessness on the part of the servant of the defendant in operating the same, fell; and if you further believe, from the evidence, that the injury to the plaintiff complained of was caused by the fall of such elevator, then your verdict should be for the complainant." To the giving of this instruction the defendant then and there excepted.

The evidence introduced on the trial on the part of the plaintiff showed that the elevator fell, and showed the injury to the plaintiff, and tended to show that the elevator was overloaded. No evidence was introduced, before resting the case for the plaintiff, regarding the appliances by which the elevator was worked or by which it was operated. The evidence introduced by the defendant in chief related to the appliances by which the elevator was operated, and the appliances to prevent the falling of the elevator, and the appliances for the safe carrying of passengers in and upon said elevator. The evidence shows that the real cause of the falling of the car in the elevator was the bursting of a pipe,

by which ²²⁵ the water was let out and by which the speed of the elevator was controlled. The pipe, and the water contained therein, were appliances to prevent a too rapid fall of the elevator. Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed, and the instruction in this case, in alleging that the plaintiff was in the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty construction, or to the negligence and carelessness on the part of the servants in operating the same, fell, and caused an injury to the plaintiff, stated a correct proposition of law, and stated a liability for causes alleged by the counts of this declaration.

It is insisted by the appellant that the plaintiff was not entitled to recover except for the injury caused by this accident, and not for a condition which existed prior thereto. The questions as to whether the injury resulted from the fall of the elevator, and the amount of damage, are questions of fact, which were determined by the judgments of the appellate and trial courts, and are sought to be raised in this court by the peremptory instruction to find for the defendant. That instruction was one of seven instructions asked by the defendant—as one of a series—and, as frequently held by this court, when asked as one of a series of instructions to the jury it does not present a question which will authorize this court to consider the facts.

²²⁶ The appellant insists that the court excluded evidence as to the carrying power of the car, and as to whether or not there was any known rule as to the weight of passengers that can be gotten within a given space. As stated in appellant's brief, "negligence in operating, and failure to have the most improved safety appliances or to keep them in good working order, are the only questions of negligence alleged or upon which the plaintiff was . . . entitled to recover." These questions which were asked could not in any manner enlighten the jury on the question of fact sought to be thus presented and under which the recovery was to be had. It was not error to sustain the objection thereto.

A witness called in rebuttal by plaintiff had stated that safety devices used in order to stop the car were clamped onto a steel guide, and was asked on cross-examination, "Did not you know that those steel guides are always oiled—that that is the purpose of the construction?" The witness also answered that he had put up elevators which had devices of a similar sort, and knew how they were intended to work. He was then asked, "In those that you operated, wasn't it intended that the guides should be oiled and greased?" To the two questions above, objections were interposed and sustained, to which the appellant excepted. What was done with the other elevators operated by this witness was not a question about which an examination could properly be made in reference to the subject matter that was before this jury, and whether the steel guides were always oiled, and whether that was the purpose of their construction, could not enlighten the jury on the question here presented. We are of the opinion there was no error in sustaining the objection to these questions.

The judgment of the appellate court for the first district is affirmed.

ELEVATORS.—Those who run passenger elevators are common carriers, and must exercise great care and caution, both in their construction and operation, to avoid accidents and injuries to those who use them: See monographic note to Southern etc. Assn. v. Dawson, 56 Am. St. Rep. 806-810, on the liabilities of owners of elevators used for passengers or employés.

EDWARD HINES LUMBER COMPANY v. LIGAS.

[172 ILLINOIS, 315.]

MASTER AND SERVANT—LATENT DEFECTS—DUTY OF MASTER.—A master is not an insurer of his servant's safety, but he must use reasonable care to protect him from injury arising from latent defects in appliances for the servant's work.

MASTER AND SERVANT—SAFE PLACE TO WORK—DUTY OF MASTER.—The duty of a master to provide his servant with reasonably safe appliances and places to work is a personal one, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance.

MASTER AND SERVANT—SAFE PLACE TO WORK—FELLOW-SERVANTS.—A person who is charged by a master with the duty of preparing a place for a servant to work is not to be regarded as a fellow-servant of him who uses the place.

MASTER AND SERVANT—SAFE PLACE TO WORK—NOTICE, BY SERVANT, OF DEFECTS.—A servant must take notice of patent defects, but is not bound to examine for latent defects, and may act on the presumption that the master has discharged his duty in preparing the place for his work, so as to make it reasonably safe for the use to which it is to be put.

MASTER AND SERVANT—SAFE PLACE TO WORK—HANDLING LUMBER—MASTER'S LIABILITY FOR INJURY.—A master is answerable for the negligent performance, by his servant, of a duty to place boards, in a lumber yard, in position for a scaffold on which other servants are to stand while handling lumber. Hence, if the servant tells a workman to go upon the scaffold, and, in doing so, he stands upon a board which projects from a pile of lumber to support the scaffold, but which is defective by reason of a knot therein not noticeable, and the board breaks, precipitating the workman to the ground, and injuring him, the master is liable.

Action brought by Ligas against the appellant company to recover damages for a personal injury, which occurred on January 30, 1894. The company owned a lumber yard in the city of Chicago, and, on the day of the accident, the company's foreman took Ligas to a pile of lumber in the lumber yard and directed him to go upon part of a scaffold, at the side of the pile, for the purpose of handing down lumber. In doing so Ligas stood upon one of the boards which projected from the pile to support the scaffold. The board broke, precipitating Ligas to the ground and injuring him. The lumber pile was about thirty feet high. On each side of it were three projecting boards, one in the middle and one at each end. Each board was an inch thick, twelve inches wide, and projected about three feet from the pile. These boards were so placed when the pile was built, for the purpose of supporting other boards to be placed on them so as to form a scaffold. It was necessary for these projecting boards to support, not only the weight of the lumber, which constituted the temporary flooring, and the lumber passed down, but the weight of the man standing on the scaffold to pass lumber down. If lumber had to be taken from a pile high enough to require the use of the scaffold, one man would get on top of the pile and pass the lumber down to another man standing on the scaffold, who would pass it on to the ground. The board in question was defective by reason of a knot therein. This knot was close to the pile, and could not be seen from the bottom. The top of the board was rough. Ligas was employed by the company in May, 1893, and worked for it until the day of the accident. He was engaged, during that time, as a laborer about the yard, handling lumber therein. Ligas did not, however, build the pile of lumber at which the accident occurred. This was done by one Emanuel Rybar, one of the company's employes. There was a judgment for the plaintiff, and the company appealed.

W. B. Keep and Moran, Kraus & Mayer, for the appellant.

Brandt & Hoffman, for the appellee.

317 MAGRUDER, J. The opinion of the appellate court, rendered upon the decision of this case, correctly disposed of the questions involved, and is adopted as the opinion of this court. That opinion is as follows:

"A master is bound to the exercise of reasonable care with reference to all the appliances of his business, and is bound to protect his servants from injury therefrom by reason of latent or unseen defects, so far as such care can do so; but the master is not an insurer to his servant against injury, and is only chargeable for damage happening to his servant from defective appliances when negligence can properly be imputed to him. The servant is bound to see for himself such risks and hazard as are patent to observation, and is bound to exercise in the discovery of risks and hazards such opportunities for observation, skill, and judgment as he possesses; but when the danger from a defective appliance is not patent, the servant has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe and free from hazard: *Wood on Master and Servant*, 680.

"The duty of the master to exercise reasonable care that the machinery, appliances, and place to work which he supplies to the servant are reasonably safe is a personal one, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance: *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

"Where a servant is injured by the negligence of a fellow-servant of the common master, the master is not liable. In this state, in order that one servant should **318** be the fellow-servant of another, their duties must be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution: *Joliet Steel Co. v. Shields*, 134 Ill. 209.

"As in very many instances, and, as regards corporations, in all cases, the master, through the instrumentality of agents, supplies to the servant machinery, tools, and appliances, and provides a place for him to work, much discussion has arisen, in cases of accidents arising from defective machinery or appliance, as to whether the agent of the master by whom such machinery or appliance was supplied was the fellow-servant of the person injured, it being insisted that if such was the case the master should not be held liable. In many instances the court, upon its discussion of the subject, has come to the conclusion that the agent supply-

ing the machinery or appliance was not a fellow-servant of the person injured, within the rule by which the relation of fellow-servants is determined.

"Our attention has been called to the opinion of the court in *Fraser v. Red River Lumber Co.*, 45 Minn. 235, in which the court says that, in its opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrument is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, the court goes on to say, the master is not liable.

"There is a certain incongruity in holding that the duty to exercise reasonable care in providing reasonably safe appliances and machinery is a personal one, which cannot be delegated, and at the same time holding that if the failure to exercise such reasonable care was the neglect of a fellow-servant of the party injured then the master is not liable; and it seems more correct to say ³¹⁹ that agents who are charged with the duty of supplying safe machinery and appliances are not, when so doing, in the true sense, to be regarded as fellow-servants of those who are engaged in the use of the same.

"This subject has received very intelligent and able consideration in *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 642, the conclusion reached being that where the employé is not guilty of contributory negligence no irresponsibility for the injury to him, caused by the defective condition of the machinery and instruments with which he is required to work, should be admitted, except it could not have been known or guarded against by proper care and vigilance on the part of his employer. The subject was also recently carefully considered in *Moynihan v. Hills Co.*, 146 Mass. 586, 4 Am. St. Rep. 348, in which the court said: 'In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, as far as the exercise of proper care on his part will secure them, and the servant agrees to assume all the ordinary risks of the business, and, among them, the risk of injury from the negligence of his fellow-servants. This obligation which the master assumes is personal, and appertains to him in his relation to the business as proprietor and in his relation to the servant as master, and it has been repeatedly held that he cannot discharge it by delegating a performance of his duty to another; . . . and if he employs agents or servants to represent him in the per-

formance of this duty, they are, to that extent, agents or servants for whose conduct he is responsible. The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow-servant for whose negligence he is not to be responsible.'

"In *Lewis v. Seifert*, 116 Pa. St. 628-647, 2 Am. St. Rep. 631, the court said: 'There are some duties which the master owes to his ³²⁰ servant and from which he cannot relieve himself except by performance. Thus, the master owes to every employé the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct personal and absolute obligation, and while the master may delegate these duties to an agent, such agent stands in the place of his principal, and the latter is responsible for the acts of such agent.'

"In *Wood on Master and Servant* it is said that in an action like the present the servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1. That the appliance was defective; 2. That the master had notice thereof, or knowledge, or ought to have had; 3. That the servant did not know of the defect, and had not means of knowing equal to those of the master: *Wood on Master and Servant*, sec. 414; *Goldie v. Werner*, 151 Ill. 551.

"In the present case, the jury has found all of these propositions for appellee. As to the first, it is clear that the appliance was defective. Did the master have notice thereof? The defect was one which could have been discovered upon examination with a view to ascertaining whether the board which broke was suitable for the purpose for which it was used. Was the defect patent? Was it such that appellee, by the exercise of ordinary care for his own safety in the discharge of his duty to appellant, would have discovered? As to this, it must be borne in mind that while the servant must take notice of things that are patent, he is not bound to make an examination for defects, but has a right to act upon the presumption that the master has discharged his duty to exercise reasonable care to see that the appliance is reasonably safe for the use to which it is to be put. Appellee was bound not only to take notice of what was patent, but to exercise ordinary care for his own safety, while appellant was bound to exercise reasonable care in selecting the ³²¹ materials out of which the scaffold upon which appellee was told to go was constructed.

"Upon an examination of the record, we cannot say that the jury was wrong in finding, as it did, that the defect in the board which broke was not so patent that appellee should have taken notice of it, or that, when told to make use of the same, appellee failed to exercise ordinary care by not examining the board to see if it was defective. Under the rule that the servant has a right to presume that the master has discharged his duty of exercising reasonable care to see that the appliances supplied are reasonably safe for the use to which they are to be put, the servant is not bound to look for defects which are not patent to a man of his intelligence, knowledge, and experience: *Goldie v. Werner*, 50 Ill. App. 297.

"We cannot say that the jury was wrong in refusing to find that the opportunity of appellee for ascertaining the defect in this board was equal to that of the appellant. The board was selected by appellant, put in its place to be used as a part of the scaffold by his agents, who, when they did this, were not, in so doing, fellow-servants of appellee.

"Whether the men who constructed this platform were fellow-servants of appellee as regards matters other than the supplying of machinery, appliances, or place to work, is a question which in this case we do not think we are called upon to answer. Nor need we discuss what the liability of appellant would have been had appellee been one of those by whom the scaffold was erected. In such case, it may be that appellee's opportunities for knowing the character of the material entering into the composition of this scaffold would have been equal to those of appellant, and that thus, having notice of the defect, he could not recover for an injury caused thereby. It seems clear that appellee did not assist in constructing this platform, and while it is true, as argued, that in the use thereof it was expected that boards would be laid along ³²² upon the projecting boards one of which broke, we do not see that appellee, being told to climb up as he did, could in the first instance have placed these other boards without, before that, resting his weight upon one of the projecting boards.

"The jury was fairly instructed, so that we find in the record no error warranting a reversal of the judgment of the superior court, and it is affirmed."

For the reasons stated in the foregoing opinion, the judgment of the appellate court is affirmed.

MASTER AND SERVANT—SAFE PLACE TO WORK—
DEFECTS—DUTIES—LIABILITY.—It is the duty of an employer

to provide a safe place in which his employ  s may work: *Prescott v. Ball Engine Co.*, 176 Pa. St. 459; 53 Am. St. Rep. 683; *McMahon v. Ida Min. Co.*, 95 Wis. 308; 60 Am. St. Rep. 117; and it is the duty of the master to search for latent defects in appliances furnished the servant with which to work that might render them unsafe. The servant may presume that this duty has been performed, and act upon such presumption, without being guilty of negligence: *Louisville etc. Ry. Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883. He is only required to notice patent defects, not latent ones: See monographic note to *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 321, 322, on how far the servant may rely upon the superior knowledge of his master concerning risks. The duty of providing for the safety of employ  s is a personal one, resting on the employer, and cannot be delegated: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436; 52 Am. St. Rep. 896; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187. If the duty to provide a safe place in which the servant is to do his work is, by the master, confided to another servant or employ  , the employer is answerable, if the duty is so negligently done that injury results: *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187; note to *Promer v. Milwaukee etc. Ry. Co.*, 48 Am. St. Rep. 910; *Nord Deutscher etc. S. S. Co. v. Ingebregsten*, 57 N. J. L. 400; 51 Am. St. Rep. 604. If an employ  , although a fellow-servant of an injured employ  , is charged with the master's duty to such employ  , his failure in that duty is the negligence of the master, and the doctrine of fellow-servants does not apply: *Hayes v. Colchester Mills*, 69 Vt. 1; 60 Am. St. Rep. 915. Who are fellow-servants in a common employment is the subject of a monographic note to *Fox v. Sandford*, 67 Am. Dec. 588-597.

TERRE HAUTE AND INDIANAPOLIS RAILWAY COMPANY v. WILLIAMS.

[172 ILLINOIS, 379.]

RAILROADS—DUTY TO FENCE—CONSTRUCTION OF STATUTE.—The statute of Illinois, requiring railroad companies to fence their tracks and to erect cattle-guards, imposes an absolute duty, not only to protect the lives of animals, but also to protect human beings upon railroad trains, by keeping the track clear of obstructions.

RAILROADS—FAILURE TO FENCE—CONSTRUCTION OF STATUTE—LIABILITY.—A provision in a statute requiring railroad companies to fence their tracks and to erect cattle-guards, that they shall be answerable for all damages to stock arising from a failure to perform such duty, does not exclude all other liability which may arise from such failure.

RAILROADS—FAILURE TO FENCE—LIABILITY OF COMPANY FOR PERSONAL INJURIES.—If a railroad company fails to perform its absolute statutory duty to fence its track and to erect cattle-guards, and one of its employ  s, such as the engineer of a train, is injured, while in the exercise of due care, because of such failure, the company is answerable in damages.

MASTER AND SERVANT—NOTICE AND ASSUMPTION OF RISK BY RAILROAD ENGINEER—FENCES AND CATTLE-

GUARDS.—There is nothing in the nature or character of the duties of a railroad engineer which would direct his attention to the fences or cattle-guards along the line of the road. He is not, therefore, required to know their condition, and has a right to assume that the railroad company has discharged its duty concerning them.

MASTER AND SERVANT—NOTICE AND ASSUMPTION OF RISK BY RAILROAD ENGINEER—FENCES AND CATTLE GUARDS.—An engineer of a railroad company is not chargeable with notice that the company has neglected to fence its track, in an unincorporated village, and to construct cattle-guards at a highway crossing therein, from the fact that he has passed through the village, several times a week, for a number of years, in running over the road. He cannot, therefore, be held to have assumed the increased risk.

RAILROADS—FAILURE TO FENCE—LIABILITY OF COMPANY FOR PERSONAL INJURIES RESULTING IN DEATH.—If a railroad company fails to fence its track and to construct cattle-guards as required by law, and a train is derailed at a highway crossing, in consequence of such failure, by striking cattle which have strayed upon the track, the company is answerable for the death of the engineer, caused by such collision, where he did not have notice of the absence of fences and cattle-guards and was not negligent in running his train.

Action to recover damages for personal injuries resulting in the death of James C. Williams. The action was brought by Cora M. Williams, administratrix of the estate of the deceased, against the railway company, whose negligence was alleged to have caused the death. There was a judgment for the plaintiff in the trial court. This judgment was affirmed, on appeal to the appellate court, and from such judgment of affirmance the company appealed to the supreme court by prosecuting a writ of error.

T. J. Golden and W. C. Outten, for the appellant.

David Hutchison, James J. Finn, and Alexander McIntosh, for the appellee.

380 CRAIG, J. At the station of Tabor, where the accident happened, the railroad track was not fenced, and there was no cattle-guard where the public highway crosses the railroad to prevent cattle from passing upon the track. Tabor is not an incorporated town or village, and it was not laid out into lots or blocks. The place consisted of a postoffice, a grain elevator, one dwelling, and several corncribs. On the night of the accident cattle strayed from an adjoining farm, and in the absence of a fence or cattle-guard they passed upon the railroad track, where they were struck by the engine attached to a freight train. The engine was thrown from the track, and Williams, the engineer, killed.

The theory of the plaintiff is, that the failure of the railroad company to fence its track and erect a cattle-guard at or near the place where the collision occurred, to prevent cattle from passing upon the track, was the direct cause of the accident and of the death of the engineer, and on account of the failure of the railroad company to discharge the duty imposed by law it is liable. On the other hand, it is claimed that the statute requiring ³⁸¹ a railroad company to fence its track and erect cattle-guards was not passed for the protection of passengers or employés, but was enacted solely to provide a remedy for the owner of horses, cattle, or other stock which might be killed on account of the failure of the railroad company to fence its track or erect suitable cattle-guards.

The statute seems to impose an absolute duty on railroad companies to erect and maintain fences along their rights of way and to construct and maintain cattle-guards at road crossings, except in such portions of incorporated cities, towns, and villages as are laid out into lots and blocks: Hurd's Stats., c. 114, sec. 62. It is true that the statute contains a provision that, if such fences or cattle-guards are not made or kept in good repair, such railroad corporation shall be liable for all damages which may be done by the agents, engines, or cars of such corporation to cattle, horses, sheep, hogs, or other stock thereon; but this provision cannot be held to exclude all other liability which may arise from a failure of the railroad company to fence and put in cattle-guards, as required by law. It may be that the statute was primarily intended for the benefit of the owners of stock when their stock was killed on the railroad track, but at the same time the statute was doubtless intended for the benefit of all classes of persons who might need protection. The person whose business requires that he should take passage as a passenger on a train has a deeper interest in having the track protected from obstructions of every character than the owner of stock. So, also, the employé on a railroad train has a deep interest. The lives of the passenger and employé are alike at stake when the railroad is not properly protected from obstructions which are likely to be upon the track where it is not properly fenced. It is, therefore, unreasonable to suppose that the legislature would provide a law for the protection of property and make no provision whatever for the protection of life.

³⁸² Counsel for defendant cite and rely upon *Wabash Ry. Co. v. Brown*, 5 Ill. App. 590. Upon an examination, it will be found that case is predicated principally on *Langlois v. Buf-*

falo etc. R. R. Co., 19 Barb. 364. The principle, however, laid down in the Langlois case was repudiated by the New York court of appeals in *Donnegan v. Ehrhardt*, 119 N. Y. 472. In the decision of that case it was among other things said: "A railroad company, for the safety of its passengers as well as its employés upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain, common-law principles, must be held responsible. . . . Independently of any statutory requirement a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track to guard against such danger. But whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty, and for a violation thereof causing injury the railroad company incurs responsibility." The rule announced in the case last cited is fully sustained in *Atchison etc. R. R. Co. v. Reesman*, 60 Fed. Rep. 370.

Dickinson v. Omaha etc. R. R. Co., 124 Mo. 140, 46 Am. St. Rep. 429, is also a case in point. There, as here, an action was brought to recover for the death of an engineer. There, cattle had strayed on defendant's right of way through ³⁸³ a defective fence, and the engine collided with the cattle and was thrown from the track. The railroad company was held liable. It is there said: "We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions as to see that the ties and rails are sound and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it with fences. . . . It is true that the statute requiring railroad corporations to fence their tracks only in express terms gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this

duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public: *Briggs v. St. Louis etc. Ry. Co.*, 111 Mo. 173, and cases cited."

We are satisfied that a fair and reasonable construction of the statute required the railroad company to fence its track and construct cattle-guards, and for a failure to do so it is liable to an employé who may have been injured through its failure to perform a duty thus imposed by law.

It is, however, contended that the deceased assumed the risk arising from the failure of the railroad company to fence its track and construct cattle-guards at the place in question, because he knew that the track was not fenced and the cattle-guard was not constructed, and yet continued in the service of the railway company without objection. A railroad company is required to use reasonable and ordinary care and diligence in procuring suitable and safe machinery and appliances for its employés, and if an employé is injured through the failure of the railroad company to discharge the duty imposed upon it, the company will be liable. Where, however, the employé continues to work with machinery or other appliances ³⁸⁴ furnished by the employer after he has knowledge of its defective condition, as a general rule he will be deemed to have assumed the risk of such defects when he has not been led by the employer to believe that the defects would be remedied: *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417. Here the accident occurred before daylight, at about 4:30 o'clock in the morning. It is not suggested that the negligence of the engineer in the management or running of the train contributed to the injury, but it is contended, from the fact that the engineer had run over the road two or three times a week for three years and had often stopped at Tabor for the purpose of switching cars, he must have known that the road was not fenced and that the cattle-guards were not constructed. The run of the engineer was from Terre Haute to Peoria—a distance of about one hundred and seventy-five miles. It does not appear from the evidence that the deceased knew of the defects complained of, nor does it appear that there was anything in the nature of the duties of the deceased which would convey to him information in regard to the condition of the fence or cattle-guard. It is no doubt the duty of an engineer, in the management of his train, to look out and look ahead for obstructions or signals, and to look out for signals when switching, as suggested in the argument of defend-

ant; but, so far as appears, there is nothing in the nature or character of the duties of an engineer which would direct his attention to the fences along the line of the track or the cattle-guards at a highway crossing. It is, therefore, unreasonable to believe that the engineer had notice of the condition of the fence and cattle-guards at the place where the accident occurred. It was held in *Chicago etc. R. R. Co. v. Johnson*, 116 Ill. 206, that the law does not require that a brakeman on a freight train should know all the defects of construction and obstructions there may be along the line of the railroad. For a like reason it may properly be said that an engineer is not required to know the condition of the fences or ³⁸⁵ cattle-guards along the line of the road: See, also, *Illinois Cent. R. R. Co. v. Sanders*, 166 Ill. 270. The duty of fencing the track and constructing cattle-guards at highway crossings was imposed upon the railroad company, and the deceased had the right to believe that the railroad company had discharged its duty in this regard; hence there was no reason why he should be on the constant watch to learn the condition of the fences and cattle-guards: *Illinois Cent. R. R. Co. v. Sanders*, 166 Ill. 270.

We do not, therefore, think that it appears from the record that the deceased had notice that the track at the place of the accident was not fenced or that the cattle-guard was not in a proper condition. An employé does not assume all the risks of the service in which he may be engaged, but he assumes only ordinary and obvious or known risks. Such risks as are usually incident to the service and such as he ought to have known were incident thereto, or such as come to his knowledge and of which he does not complain or object to, may fairly be said to have been assumed by him: *Wood on Master and Servant*, 385. The principle involved in the rule announced is, that a servant cannot recover for an injury which grew out of his own negligence, and proof of his remaining in the service of the employer with knowledge of the risk and consequent danger may be regarded as negligence. But here, as said before, it does not appear that the deceased had notice, and negligence could not, therefore, be imputed to him.

From what has been said it follows that the motion to instruct the jury to find for the defendant was properly denied, and the court did not err in refusing defendant's instruction No. 2.

The judgment of the appellate court will be affirmed.

Mr. Justice Boggs took no part in the decision of this case.

RAILROADS—FENCES—MASTER AND SERVANT—SAFE PLACE IN WHICH TO WORK.—A railroad company, especially in thickly settled portions of the country, is bound to keep its track safe and free from obstructions, by proper fences, upon the principle that the master is bound to use ordinary care in keeping the premises upon which his servant is required to work in a condition reasonably safe and secure for the performance of the duties required of him: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429. It is the master's duty to provide a safe place in which his employés may work: *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; ante, p. 38; and an employé upon a railroad train, or, in the event of his death, his representatives, may recover for injuries received without his own fault by reason of the company's negligence in failing to comply with the law requiring it to fence its track: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429. An engineer on a railroad train is not obliged to inspect fences along the track; and, if the railroad company fails to keep its track fenced as required by law, and a bull strays thereon through a defect in the fence, and collides with a passing engine, whereby its front wheels are derailed, and it is soon thrown over, killing the engineer, notwithstanding it has been reversed and the air-brake applied, the negligence of the company in failing to keep the fence in repair is the proximate cause of the accident, though the engine is running faster than allowed by the rules of the company, and is thrown from the track by reason of coming into a switch, in its derailed condition, nearly a thousand feet from where it struck the bull: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429.

LOWERY v. PEOPLE.

[172 ILLINOIS, 466.]

BIGAMY—PRESUMPTIONS—PROOF OF MARRIAGE.—If two successive marriages are charged in a prosecution for bigamy, the presumption in favor of the legality of each is equal, and an actual marriage in each case must be proved.

BIGAMY—BOTH MARRIAGES—HOW PROVED.—In a prosecution for bigamy, both marriages must be proved, though it is not necessary to prove either by record evidence, such as the register or certificate. In each instance the marriage may be proved by such evidence as is admissible to prove a marriage in other cases.

BIGAMY—PROOF OF MARRIAGE—COHABITATION AND REPUTATION—ADMISSIONS.—In a prosecution for bigamy, marriage may be proved by admissions of the defendant of a marriage in fact, especially when supported by evidence of cohabitation and reputation as husband and wife, but evidence simply of cohabitation and reputation as man and wife, without any admission of a marriage in fact, is not proof of marriage.

BIGAMY—WITNESSES—COMPETENCY OF SECOND WIFE.—In a prosecution for bigamy, where two successive marriages are charged, it is only in cases where the first marriage is not controverted, or has been established by other evidence, that the second wife is allowed to testify. She is not competent to prove the first marriage, where that is controverted. Hence, she cannot testify as to admissions made by the defendant concerning the existence of the first marriage.

Hillis & McCoy and Dougald Muir, for the appellant.

E. C. Akin, attorney general, Charles S. Deneen, state's attorney, and Harry Olson, assistant, for the people.

⁴⁶⁸ CARTWRIGHT, J. Plaintiff in error was convicted in the criminal court of Cook county of the crime of bigamy, upon an indictment charging that he was lawfully married on June 23, ⁴⁶⁹ 1892, to Clara E. Squier at Milwaukee, in the state of Wisconsin, and that afterward, on February 14, 1896, at Columbus, in the state of Ohio, he unlawfully married Annie May Quinnell.

At the trial, the second marriage with Annie May Quinnell, and the fact that defendant resided with her as his wife in Cook county, Illinois, from March, 1896, to June, 1897, were conclusively proved and not controverted. The evidence as to the first marriage consisted of testimony that defendant and the alleged first wife lived together as husband and wife in Chicago previous to the second marriage, and while so living together he called her his wife, and said that they had been married in Milwaukee, Wisconsin, and showed what purported to be a marriage certificate. Defendant, claiming that evidence of that kind was insufficient to convict him, asked the court to give to the jury the following instruction: "The jury are instructed that the defendant cannot be convicted of the crime charged where the only evidence of the first marriage charged is proof of cohabitation of the defendant and the alleged first wife as man and wife, and that they had stated that such marriage had taken place."

Where the relation of husband and wife has been assumed, the law generally presumes in favor of a lawful marriage; but where it is charged that two successive marriages have taken place the presumption in favor of the legality of each is equal, and an actual marriage must be proved. In this case the presumption that would ordinarily obtain in favor of the first marriage is met by an equal presumption in favor of the legality of the second marriage, and therefore it was incumbent on the prosecution to show the first marriage to be a marriage in fact. This proof of an actual marriage may be made, however, as of any other fact. Our statute provides that it shall not be necessary to prove either of the marriages by the register or certificate or other record evidence, but the ⁴⁷⁰ same may be proved by such evidence as is admissible to prove a marriage in other cases: Rev. Stats., c. 38, sec. 29. In *Jackson v. People*, 2 Scam. 231, it was said that the object of this statute was to let in an inferior grade of evidence,

and that it was discretionary with the state's attorney as to the kind of evidence he would use. It has been held in some cases that admissions of the defendant of a marriage in fact, though supported by proof of cohabitation and reputation as husband and wife, are not sufficient to prove the fact of marriage, but the great weight of authority is adverse to that position. We can see no reason why an admission or declaration of the defendant of the fact of his marriage should not rest on the same footing as an admission of other facts essential to establish his guilt. There can be no reason for discriminating in such a case, and exempting one fact from the rules of evidence applicable to others. The statement of the defendant may be as conclusive and satisfactory as any other proof of his marriage, and as to that question the jury is to determine. The fact need not be proved by direct evidence, but may be established, like any other fact, by admissions of the defendant: *Miles v. United States*, 103 U. S. 304; *Regina v. Simmonsto*, 1 Car. & K. 164; *Wolverton v. State*, 16 Ohio, 173; 47 Am. Dec. 373; *Oneale v. Commonwealth*, 17 Gratt. 583; *Williams v. State*, 54 Ala. 131; 25 Am. Rep. 665; *Halbrook v. State*, 34 Ark. 511; 36 Am. Rep. 17; *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225; *Squire v. State*, 46 Ind. 459; *Dale v. State*, 88 Ga. 552; *Commonwealth v. Hayden*, 163 Mass. 453; 47 Am. St. Rep. 468. In *Tucker v. People*, 117 Ill. 88, the admission of the defendant was deemed competent evidence so far as it went, but it was not sufficient to prove the charge in the indictment, and in *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, the evidence was simply of cohabitation and reputation as man and wife, without any admission of a marriage in fact, and it was held that such a marriage had not been proved. It is always held in prosecutions for bigamy that the marriage cannot be proved by cohabitation and reputation merely, for the reason ⁴⁷¹ already given, but it may be proved by the kind of evidence in question here, if sufficient to establish the fact, and it was not error to refuse the instruction.

The second wife, Annie May Quinnell, whose marriage with defendant was proved and not controverted, was allowed to testify against the objection of defendant, and gave evidence tending to establish the fact of the first marriage with Clara E. Squier. She testified that defendant told her, after they were married, that he and the alleged first wife went to some town a short distance from Chicago and went through some marriage ceremony. Greenleaf lays down the rule that if the first mar-

riage is clearly proved and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as other facts not tending to defeat the first or to legalize the second, but that she ought not to be admitted at all if the first marriage is still a point in controversy: 3 Greenleaf on Evidence, sec. 206. In *Miles v. United States*, 103 U. S. 304, it is said that it is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify; that she is never competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all, and that in cases where she can testify she may be a witness to the second marriage, but not to the first. The same rule is laid down in 4 American and English Encyclopedia of Law, second edition, 47. In this case the only controverted question is the fact of the first marriage, and the court clearly erred in allowing Annie May Quinnell to testify as a witness. For this error the judgment must be reversed.

The judgment is accordingly reversed and the cause remanded.

BIGAMY—PROOF OF MARRIAGE.—On the trial of an indictment for bigamy, an actual marriage, or marriage in fact, must be clearly proved in both the first and second instances by direct evidence: Note to *Hiler v. People*, 47 Am. St. Rep. 232; and evidence of the confessions, declarations, or admissions of the defendant are admissible for the purpose of establishing the fact of marriage: Notes to *State v. Johnson*, 93 Am. Dec. 254; monographic note to *Hiler v. People*, 47 Am. St. Rep. 228, 230, 232, on proof of former marriage in prosecutions for bigamy. The regular official record is, of course, the most perfect and satisfactory proof of marriage, but the fact of marriage may be proved without the record: Notes to *State v. Johnson*, 93 Am. Dec. 254; *Hiler v. People*, 47 Am. St. Rep. 228, 230. Cohabitation, repute, and declarations of a man and woman do not constitute a marriage on which a conviction for bigamy can be based by reason of an actual subsequent marriage: *Hiler v. People*, 156 Ill. 511; 47 Am. St. Rep. 221. Contra, see notes to *Hiler v. People*, 47 Am. St. Rep. 228, 230; *State v. Johnson*, 93 Am. Dec. 255.

BIGAMY—EVIDENCE.—THE PRESUMPTION of a marriage arising from cohabitation, repute, and declarations is rebutted by a subsequent actual marriage with another person, and the assumption of similar relations: *Hiler v. People*, 156 Ill. 511; 47 Am. St. Rep. 221.

BIGAMY—SECOND WIFE AS WITNESS.—As long as the first marriage is denied and disputed, the second wife is an incompetent witness for the prosecution; but where it has, by other evidence, been duly established to the satisfaction of the court, she may be admitted to prove her marriage with him: Note to *State v. Johnson*, 93 Am. Dec. 255.

KNICKERBOCKER v. MCKINDLEY COAL AND MINING COMPANY.

[172 ILLINOIS, 585.]

APPEAL—PRESUMPTION WHERE EVIDENCE IS NOT PRESERVED.—If the evidence is not preserved in the record, either by a bill of exceptions or by a certificate of evidence, it will be presumed that the facts recited in the decree were found upon sufficient evidence.

RECEIVERS—PURCHASE, ON FORECLOSURE, BY THE MORTGAGOR'S PERSONAL REPRESENTATIVES—EFFECT OF.—If property in the hands of a receiver is sold under the foreclosure of a deed of trust, and is bought by the personal representative of the party who created the indebtedness which occasioned the receivership, such purchase amounts merely to a payment of the indebtedness, leaving the property in their hands subject to the charge of the receivership expenses.

RECEIVERS—CLAIMS AGAINST—WHEN PURCHASERS ARE ESTOPPED TO QUESTION.—If hotel property and furniture, in the hands of a receiver, are sold under foreclosure proceedings, and the court orders him to turn it over to the purchasers, but an appeal is taken from such order, and, pending the appeal, the purchasers consent to the receiver's retaining the property and keeping the business a "going concern," they are estopped from denying the validity of claims against the receiver for coal and groceries furnished for that purpose.

RECEIVERS—CARING FOR PROPERTY—NECESSARY EXPENSES.—When a court of equity takes charge of property through a receiver, it becomes chargeable with the necessary expenses incurred in preserving it, and the court has the right to keep the property under its control until such expenses have been paid or secured.

RECEIVERS—DECREE—TAKING PROPERTY SUBJECT TO CHARGE.—If property is in the hands of a receiver, one who acquires it under the final decree of the court takes it cum onere, chargeable with amounts due to the receiver for necessary expenses.

RECEIVERS.—THE OBJECT OF APPOINTING a receiver is to preserve the property for the benefit of all parties interested, and this object is sometimes best attained by continuing a business, which will be done where the interests of all parties will be best preserved by doing so.

RECEIVERS—EXPENSES OF CONTINUING BUSINESS—HOW CHARGEABLE.—The necessary expenses of keeping a business, in the hands of a receiver, a "going concern" must be charged first upon the net income, but, if that is not sufficient, they may be charged upon the corpus of the property, or upon its proceeds after sale.

RECEIVERS—KEEPING BUSINESS A "GOING CONCERN"—CASES IN WHICH IT MAY BE DONE.—Although the authority of a receiver to incur indebtedness, in order to keep the business a "going concern" until the rights of the parties are adjusted and a sale is effected, ordinarily arises only in cases of railroad companies, yet the same rules may be applied in other cases under like circumstances.

Proceeding by way of intervention. The appellees, the

Knickerbocker Coal and Mining Company and the Steele-Wed-
eles Company, were intervening creditors, who, on July 6, 1895,
filed an intervening petition in a certain proceeding originally
begun by one James J. Gore against Patrick H. Heffron to settle
and adjust their partnership interests in certain property, part
of which was Gore's Hotel, in the city of Chicago, and the fur-
niture therein. The petitioners in that proceeding, who were
the appellees in this case, had furnished coal and groceries to
the receiver of the hotel, who was managing it under an order
of court. It was alleged in the petition that the receiver in
charge of the hotel had refused to pay the petitioners for the
supplies furnished by them. It was, therefore, prayed that he
be required to sell and dispose of so much of the furniture and
fixtures of the hotel as might be necessary to realize money
enough to pay the claims. To this intervening petition, an-
swers were filed by the receiver, and by John J. Knickerbocker
and others, the appellants, who were the executors of the will of
the deceased complainant in the original suit, and also by Heff-
ron, the original defendant. To such answers, replications were
filed, and upon the issue thus raised a decree in chancery to pay
the claims was entered. An appeal was taken to the appellate
court, which affirmed the decree, and from such judgment of
affirmance an appeal was taken to the supreme court. The
amount involved in the intervening suit being less than one
thousand dollars, the appellate court granted a certificate of im-
portance.

Knickerbocker & Smith and John S. Cooper, for the appel-
lants.

Moran, Kraus & Mayer, for the appellees.

543 MAGRUDER, J. The question in this case relates to
the right of a party, furnishing supplies to a receiver, to enforce
payment for such supplies against the fund or property in the
hands of the receiver.

The material facts are set forth in full in the decree itself.
The record in the case contains no certificate of evidence. It
must, therefore, be assumed that the findings of the decree
were sustained by sufficient evidence upon the hearing below.
"Where the evidence is not preserved in the record, either by a
bill of exceptions or by a certificate of evidence, the facts recited
in the decree must be taken to have been found upon sufficient
evidence": *Schuler v. Hogan*, 168 Ill. 369.

Among the facts recited in the decree are the following: Before Gore filed the bill in this case against Heffron ⁵⁴⁴ for an accounting, and to dissolve their partnership, Gore and Heffron had executed a trust deed to secure a large indebtedness of more than one hundred thousand dollars upon said hotel and the furniture and fixtures therein. Under proceedings to foreclose said trust deed a decree of foreclosure was entered, and thereunder, on March 15, 1894, said hotel building was sold to appellants for ninety-five thousand dollars, and said furniture and fixtures were sold to appellants for nine thousand two hundred and fifty dollars. This sale was afterward confirmed. Prior thereto, the first receiver, appointed in the suit between the partners, was appointed by agreement of both parties. The second receiver appointed in the cause was appointed upon the motion of the complainant, Gore. The receiver thus appointed on the motion of complainant acted as such from about October 1, 1891, until January 1, 1895, and was acting as such when appellees furnished the supplies in question.

On March 28, 1894, after the sale to the appellants under the foreclosure of the trust deed, an order was entered, directing the receiver to turn the furniture and fixtures over to the complainants. From this order thus entered on March 28, 1894, Heffron appealed to the appellate court, where the order was affirmed, but not until January 28, 1895. While this appeal of Heffron was pending, the furniture and fixtures were left in the possession of the receiver, and by the consent of the appellants and of Heffron the receiver continued to operate and conduct the hotel. It was while the receiver was thus, with the consent of the appellants, operating and conducting the hotel, and while the furniture and fixtures were in his possession, as receiver, that the appellees furnished to said receiver the supplies in question. The appellee, the McKindley Coal and Mining Company, furnished coal to said receiver between November 6 and December 3, 1894. The appellee, the Steele-Weddes Company, furnished groceries to said receiver between November 5 and December 3, 1894. The receiver did not cease to operate the ⁵⁴⁵ hotel until December 6, 1894. The decree finds that the coal and groceries furnished by the appellees were necessary to enable the receiver to conduct the hotel, and were so used by him, and that the purchase thereof was proper, and was authorized by, and was in pursuance of, an order appointing the receiver.

Under the facts thus stated and thus found in the decree, we are of the opinion that the court below decided correctly in ordering the claims of the appellees to be paid by the sale of the

furniture and fixtures, in default of the payment thereof by the appellants.

It is contended by the appellants that, by the sale of the furniture and fixtures to them in March, 1894, the property was placed beyond the reach of any charge for the receiver's expenses. Appellees did not become creditors of the receiver before the sale to the appellants, but after such sale. The purchasers of the property at the sale made in March, 1894, were not third persons, but were the executors of Gore, who was a party to the present suit. The indebtedness secured by the trust deed, under which the sale was made, was the indebtedness of Gore and Heffron. The receiver appointed in the case was appointed by agreement between Gore and Heffron. The question, then, is not whether the court has the power to make the expenses of the receivership a charge superior to prior liens owned by persons not parties to the suit, in which the receiver was appointed. Gore was responsible for the creation of the indebtedness secured by the trust deed, and for expenses of the receiver. Therefore, the purchaser at the foreclosure sale by the appellants, who stand in the place and stead of Gore, amounted merely to a payment, and left the property in the hands of the appellants, subject to the charge of the receivership expenses, if there was any charge for such expenses at that time. Where the owner of the equity of redemption of property purchases the same at a judicial sale under a mortgage created by himself, he does not thereby ⁵⁴⁶ acquire a new title, divested of liens prior to the lien under which he purchases. His purchase is nothing more than a payment of the debt, and merely relieves the property from the encumbrance thereon. "The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment": *McCarty v. Christie*, 13 Cal. 80. "If the redemption is made by the judgment debtor, who continues to hold the estate, of course it is subject to a subsequent judgment": *McLagan v. Brown*, 11 Ill. 519. When Gore, whom appellants represent, procured the appointment of a receiver over the property, he created a charge thereon for the expenses of the receivership. Hence, the appellants cannot relieve the property of that charge by purchasing it at a foreclosure sale under an encumbrance created by Gore, and for the payment of which he and his representatives are liable.

But, independently of these considerations, it must be remembered that the claims of these appellees accrued after the sale to appellants in March, 1894. It is true that, at that sale, the appellants purchased the furniture and fixtures for nine thousand two hundred and fifty dollars and that on March 28, 1894, an order was entered, directing the receiver to turn the same over to appellants. But, pending an appeal from this order, the appellants themselves consented that the furniture and fixtures should remain in the possession of the receiver, and that the receiver should continue to operate and conduct the hotel. Not only so, but the appellants, on the 7th or 8th of November, themselves filed a petition before the court for an order, directing the receiver to include the said furniture and fixtures in a lease to be thereafter made, which lease was to take effect on December 6, 1894. This was a recognition of the right of the receiver at that time to dispose of the furniture and the fixtures by a lease. The appellants are estopped ⁵⁴⁷ from saying that appellees should not be paid for the coal and groceries furnished by them to the receiver, when the receiver was running the hotel with their consent and with their furniture and fixtures. It is impossible to conceive how a hotel can be operated properly without coal and without groceries.

Such being the facts, what is the law applicable to them? "When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court, and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid": *Beckwith v. Carroll*, 56 Ala. 12; *Beach on Receivers*, sec. 771; *High on Receivers*, sec. 796. Mr. High, in his work on *Receivers*, at section 796, after stating the doctrine that, when a court of equity takes property under its charge by appointing a receiver, the property itself is chargeable with the necessary expenses of the receivership, says: "And, in such case, the person who, under the final decree of the court, acquires the property, or its proceeds, acquires it cum onere and chargeable with the amounts due to the receiver for services and advances."

The object of appointing a receiver is to preserve the property for the benefit of all parties interested. Sometimes this object

is best attained by continuing a business. When this is done, the court has the right, although it should exercise such right with great caution, to make the expenses of such business chargeable upon the corpus of the property, if the income is not sufficient to pay the same. Of course, such expenses must be charged first upon the net income, but, when that is not sufficient, they may be charged upon the property itself, or upon ⁵⁴⁸ its proceeds after sale. It has been held that, although this authority of a receiver to incur indebtedness in order to keep the business a "going concern" until the rights of the parties are adjusted and a sale is effected ordinarily arises only in cases of railroad companies, yet the same rules may be applied in other cases under like circumstances: *Hopfensack v. Hopfensack*, 61 How. Pr. 498; *Ellis v. Vernon Ice etc. Co.*, 86 Tex. 109; *Espuella Land etc. Co. v. Bindle*, 11 Tex. Civ. App. 262.

In *Thornton v. Highland Avenue etc. R. R. Co.*, 94 Ala. 353, a receiver was appointed, who was authorized to conduct and run a hotel, and, while he was operating the hotel, he became indebted for groceries; and it was there held that such debt constituted a proper charge, first on the income of the property, and then upon the corpus. It was there said: "The party contracting with the receiver looks to the rem, the fund or property in gremio legis, backed by a pledge of the court that it shall be liable for all costs and expenses legitimately incurred in pursuance of its orders and decrees. . . . Under such conditions, the court should never surrender its custody of the property, or discharge the receiver, until all obligations incurred by him in the proper discharge of his duties have been adjusted and provided for. . . . The order of the court, made in pursuance of an agreement made between the original parties, as averred in the petition, by which the property was placed in the hands of the complainant, did not deprive the court of authority to resume possession and control of it, for the purpose of enforcing all claims to or liens upon it, the result of its own orders or decrees": *Highland Avenue etc. R. R. Co. v. Thornton*, 105 Ala. 225.

The judgment of the appellate court and the decree of the superior court are affirmed.

RECEIVERS.—If a fund or other property is in danger, a receiver is proper. The appointment is made, generally, either to prevent fraud, to protect property from injury, or to preserve it from destruction: See monographic note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 483, on when and over what property a receiver will be appointed. The authority and power of receivers of railroad cor-

porations, with respect to keeping a railroad a "going concern," and the payment of operating expenses, are discussed in the monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 404, 409, on claims which take precedence over mortgages of railway and like property.

ABBOTT v. STONE.

[172 ILLINOIS, 634.]

USURY—INTEREST NOTES OR COUPONS.—Usury is not established by the fact that interest notes or coupons, drawing interest after maturity, are attached to a promissory note.

USURY—PROVISION FOR SOLICITOR'S FEE ON FORECLOSURE.—Usury is not established by the fact that a trust deed, in the nature of a mortgage, provides that a certain per cent of the principal, interest, and costs shall be allowed as a solicitor's fee, upon foreclosure.

USURY—COMMISSION FOR LOAN.—Usury is not established by mere proof of the fact that a sum of money was paid by the borrower as a commission for procuring the loan.

USURY—BURDEN OF PROOF.—One alleging usury has the burden of proof, and the fact must be established by a preponderance of the evidence.

MORTGAGES — FORECLOSURE — ALLOWANCE OF TAXES.—If a mortgagor fails to pay taxes as required, and they are paid by the mortgagee to protect his interest, the amount of such delinquent taxes should be allowed to him on foreclosure.

MORTGAGES—FORECLOSURE—ALLOWANCE FOR SOLICITOR'S FEE.—If a trust deed, in the nature of a mortgage, provides for the payment of a solicitor's fee, for the mortgagee, out of a sale of the mortgaged property, the court, upon foreclosure, should allow it.

Bill in equity to foreclose a trust deed given, on July 14, 1892, by Alice Asbury Abbott to Francis B. Sherwood, as trustee, to secure a loan of twenty thousand dollars, made on that date. The complainants were George W. Stone, the payee and holder of the secured note, and Francis B. Sherwood, the trustee. The principal note given by the appellant, Alice Asbury Abbott, to George W. Stone, for twenty thousand dollars, was dated July 14, 1892, and was payable on August 15, 1897, with interest at six per cent per annum, payable semi-annually, on February 15th, and August 15th, of each year. The several installments of interest were evidenced by ten interest notes or coupons of the same date as the principal note. These coupons were numbered from 1 to 10, respectively, and were all alike except as to the dates of maturity. Each coupon was for six hundred dollars, with interest at seven per cent per annum after maturity. The first four coupons and No. 6, were paid. On No. 5 the appellant made three payments, aggregating five

hundred and seventy dollars. On No. 7 she paid three hundred dollars. The balance due on each of said interest notes numbered 5 and 7 was not paid. The appellant failed to pay the taxes for 1895 levied on the property conveyed, which amounted to two hundred and thirty-nine dollars and fifty-seven cents. Stone paid these taxes to protect his interests. A suit to foreclose the trust deed was commenced on account of this default. The appellant filed an answer to the complainants' bill, but the other defendants made no appearance. The case was referred to a master in chancery, who found the amounts due, including a solicitor's fee of five hundred and thirty-nine dollars and thirty-eight cents. The master's report was confirmed by the circuit court, and a decree for the sale of the land conveyed by the trust deed was entered. This decree was affirmed, on appeal, by the appellate court, from which judgment of affirmance the defendant appealed to the supreme court.

Edward Roby, for the appellant.

Richard B. Twiss, for the appellees.

⁶³⁶ CRAIG, J. 1. Appellant insists that usury is established by the notes alone. The argument of counsel for appellant falsely assumes that the interest notes represent a separate and distinct indebtedness from the six per cent interest named in the principal note. The language in the notes is not susceptible of such meaning. The practice of giving mortgages and trust deeds, with coupon or interest notes representing the interest provided for in the principal note, is much in use. Jones on Mortgages, fifth edition, section 653, under the title of "Usury," says: "It is the general practice for corporations, in making mortgages ⁶³⁷ upon their property, to attach to the mortgage bonds coupons representing the interest, payable at the several times when the interest falls due; and this practice has been adopted in several states quite extensively by individuals in making ordinary mortgages or trust deeds upon their private property. Such coupons for the payment of definite sums at specified times are, in effect, promissory notes, and are held to draw interest after maturity. Such interest is computed at the legal rate, when the rate, as is usual, is not expressed in the coupon itself. The rate of interest provided in the bond does not control." The case of Harper v. Ely, 70 Ill. 581, 586, involved the question as to interest evidenced by coupons secured by a trust deed. This court said: "The coupons provide for the payment of a definite sum of money at a specified time. They

are in writing, and in effect are promissory notes, and we are aware of no reason why interest should not be computed upon them after they became due." Again, in *Benneson v. Savage*, 130 Ill. 352, 364, it was said: "But the executing of a coupon is the executing of an instrument which, *ex vi termini*, bears interest after maturity, if no rate is expressed, six per cent; and at the date of executing these coupons, any rate, not exceeding ten per cent, might be fixed by agreement of parties": Citing *Harper v. Ely*, 70 Ill. 581; *Humphreys v. Morton*, 100 Ill. 592. "And so, under a familiar rule applicable to such cases, authority to execute coupons necessarily implies authority to fix the rate of interest they shall bear after maturity at any sum not prohibited by law; and it is held a coupon is a part of the debt covered by the mortgage which secures its bond: *Daniel on Negotiable Instruments*, sec 149 a; *Gilbert v. Washington City etc. R. R. Co.*, 33 Gratt. 599."

Counsel for appellant, in his argument, attempts to eliminate from the principal note these two clauses, as follows: "The several installments of interest aforesaid for said period, five years, are further evidenced by ten ⁶³⁸ interest notes or coupons of even date herewith. The payment of this note is secured by trust deed of even date herewith on real estate in city of Chicago, Cook county, Illinois." He ignores the fact that the principal note for twenty thousand dollars, and the ten interest notes or coupons for six hundred dollars each, belong to one and the same series; that the principal note, on its face, refers to each interest note and the interest notes to the principal note, and are thus connected together. The principal note is numbered "No. 1," and on the face of each of the interest notes is the following: "This coupon note being for the interest due that day upon one note, No. 1, of this date, for the payment to the order of said George W. Stone, for the sum of \$20,000, due August 15, 1897, after the date thereof." This shows that the ten interest notes represent and evidence the same indebtedness contemplated by the clause "six per cent per annum," in the principal twenty thousand dollar note. When appellant paid the interest on the principal note, as she did on the first, fourth, and sixth installments, she called for and received the six hundred dollar interest notes representing the interest then due on the principal.

Neither do we find, on examination, that the trust deed is capable of being construed as usurious, as contended by appellant. It provides, in case of default in the payment of the

promissory note, or any part thereof, according to the tenor and effect thereof, or nonpayment of taxes, that foreclosure proceedings may be brought and a decree obtained and the property sold, and out of the proceeds the costs of suit, and two and a half per cent on the amount of the principal, interest, and costs, for attorneys' and solicitors' fees, etc., might be allowed. We are satisfied there is nothing to constitute usury in the form of the principal note and coupons, as contended by counsel for appellant.

2. The appellant's contention that four hundred dollars was retained by appellee Stone is not tenable. The receipt of appellant showed that the four hundred dollars was paid William L. ⁶³⁹ Pierce & Co., as commissions for procuring the loan for appellant. Stone, the lender, cannot, for that reason, be charged with usury. Usury being alleged by appellant, the burden was on her to prove it, and it was her duty to establish it by a preponderance of the evidence. This she failed to do: *Telford v. Garrels*, 132 Ill. 550, and cases cited.

3. Appellant objects to the payment by appellee Stone of two hundred and thirty-nine dollars and fifty-seven cents for taxes. Appellant neglected to pay the taxes, as provided in the trust deed, and the amount was properly allowed under the evidence.

4. It is insisted that the solicitor's fee was improperly allowed. The trust deed, among other things, expressly provided for the payment of two and one-half per cent on the amount of principal, interest, and costs, for attorneys' and solicitors' fees, in case of default in the payment of the promissory notes, or any part thereof, according to the tenor and effect thereof, and the obtaining of a decree of sale, to be paid out of the proceeds of any such sale. In *Heffron v. Gage*, 149 Ill. 182, 191, the mortgage provided for the payment of one thousand dollars for attorneys' and solicitors' fees in case of default and obtaining a decree of sale. This court said: "Whatever may be the rule elsewhere, it is well settled in this state that when a mortgage provides for the allowance of a solicitor's fee in foreclosure of a mortgage, to be paid out of the proceeds arising from a sale of the mortgaged property, it is not error for the court to decree the payment of a solicitor's fee, as was done in this case": *Telford v. Garrels*, 132 Ill. 550; *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279; *McIntire v. Yates*, 104 Ill. 491. The amount allowed for solicitor's fee was the amount agreed upon in the trust deed, and it does not appear to be unreasonable.

5. Objection is urged by counsel for appellant to the order referring the cause to the master in chancery, and the report of the master with his conclusions. A careful inspection of the same convinces us that the ⁶⁴⁰ objections urged are technical and without substantial merit. It shows the complainants and defendant and their solicitors were present before the master, and that the testimony of the parties and their witnesses was taken on the matters in issue, and the report of the master, with his conclusions and recommendations, was made to the court. Objections were filed by counsel for appellant, and, being overruled, were refiled as exceptions, but we do not find that appellant asked for a further reference to the master.

Finding no substantial error in the record, the judgment of the appellate court is affirmed.

USURY.—A stipulation to pay interest upon interest after its maturity is not usurious: *Note to Bank of Newport v. Cook*, 46 Am. St. Rep. 190, 191, on what transactions are usurious. A coupon may be used to designate the amount of interest due on a bond or note, and it will draw interest after its maturity: *Mathews v. Toogood*, 23 Neb. 536; 8 Am. St. Rep. 131; *Trustees v. Lewis*, 34 Fla. 424; 43 Am. St. Rep. 209. A stipulation to pay a certain per cent as an attorney's fee upon the foreclosure of a mortgage is not a usurious transaction: *Note to Bank of Newport v. Cook*, 46 Am. St. Rep. 193. The payment of expenses, by the borrower, of procuring a loan does not render the transaction usurious: *Note to Bank of Newport v. Cook*, 46 Am. St. Rep. 194, 198.

MORTGAGES—COUNSEL FEES UPON FORECLOSURE.—It is lawful and proper for the court, upon the foreclosure of a mortgage, to allow the stipulated counsel fee, if that is reasonable: *Notes to Pierce v. Kneeland*, 84 Am. Dec. 728; *Cox v. Smith*, 1 Nev. 161; 90 Am. Dec. 476, and note.

BOBEL v. PEOPLE.

[173 ILLINOIS, 19.]

STATUTES—SUFFICIENCY OF TITLE.—Under a constitutional provision requiring the subject of an act to be expressed in its title, the title of an act is sufficient if all provisions of the act relate to the one subject indicated in the title, and are parts of it or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the act shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act.

STATUTES—SUFFICIENCY OF TITLE—CONSTRUCTION. If there is doubt as to whether the subject of an act is clearly expressed in its title, the doubt should be resolved in favor of the validity of the act.

STATUTES—SUFFICIENCY OF TITLE—ACT PROHIBITING "USE" OF SLOT MACHINES.—An act entitled, "An act to

prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes," and which prohibits the "keeping" of such devices, is not unconstitutional on the ground that the subject of the act is not expressed in its title.

STATUTES—CONSTRUCTION—WHAT MAY BE CONSIDERED.—To ascertain the true spirit and import of an act, a court may consider the mischief it was designed to remedy.

GAMING.—AN INDICTMENT FOR KEEPING A SLOT MACHINE is sufficient, in its allegations of time and place, where it charges that the defendant, on a certain day, in a particular county and state, "unlawfully and willfully did, in a certain room," et cetera, "keep a certain slot machine," without the use of the words "then and there" before the word "keep." The allegations as to time and place are adverbial clauses, modifying the verb "did keep," and there is no other word in the indictment which they can modify.

GAMING.—AN INDICTMENT IS SUFFICIENT if it charges an offense in the language of the statute. Hence, it is sufficient to allege, in the language of the statute, that the defendant did "keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked," without alleging that such thing "was then and there staked."

GAMING—KEEPING GAMBLING DEVICES—SLOT MACHINES.—Under the statute of Illinois, a slot machine is a gambling device, and the mere keeping of it is a criminal offense, whether the machine is used for gambling or not. The purpose of the statute is to suppress such devices altogether, even by their destruction.

GAMING—KEEPING GAMBLING DEVICE—SLOT MACHINES—EVIDENCE.—Upon the trial of an indictment, under the Illinois statute, for keeping a gambling device, such as a slot machine, evidence that the machine was used for gambling is admissible to show its character as a gambling device.

Johnson & McDannold, for the appellant.

E. C. Akin, attorney general, Charles S. Deneen, state's attorney, and Albert C. Barnes, assistant, for the people.

23 CARTER, J. Plaintiff in error, Adam Bobel, was tried and convicted in the criminal court of Cook county on an indictment charging in the first count, "that Adam Bobel, late of the county of Cook, on the first day of December, in the year of our Lord one thousand eight hundred and ninety-seven, in said county of Cook, in the state of Illinois, aforesaid, unlawfully and willfully did, in a certain room then and there situated upon a certain location, then and there commonly known as No. 4500 State street, in the city of Chicago, in the state of Illinois, keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked," etc. There were two more counts in the same language, except that the second used the

words "is hazarded" instead of "is staked," and that the third count used the words "is staked and hazarded." A motion to quash the indictment, and, after trial, motions for a new trial and in arrest of judgment, were overruled and exceptions taken. Defendant below then sued out this writ of error, and asks us to reverse the judgment upon errors assigned. His contention is, that the statute under which the indictment was found is unconstitutional, and that the indictment does not state an offense against the laws of this state, and is bad on its face.

The statute on which the indictment is based is entitled "An act to prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes," approved and in force June 21, 1895 (Laws 1895, p. 156), and is, except the emergency clause, as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That whoever, in any room, saloon, inn, tavern, shed, booth, or building or ²⁴ inclosure, or in any part thereof, operates, keeps, owns, rents, or uses any clock, joker, tape, or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won, or lost, shall, upon conviction for the first offense, be fined not less than one hundred (100) dollars, and for a second offense be fined not less than five hundred (500) dollars and be confined in the county jail for not less than six (6) months, and for the third offense shall be fined not less than five hundred (500) dollars and be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years.

"Sec. 2. Every clock, tape machine, slot machine, or other machine or device for the reception of money on chance, or upon the action of which money is staked, hazarded, bet, won, or lost, is hereby declared a gambling device, and shall be subject to seizure, confiscation, and destruction by any municipal or other local authority within whose jurisdiction the same may be found.

"Sec. 3. Every owner, occupant, lessee, mortgagee, or other person in possession of any premises upon which any gambling device may be located, and every person in the use, operation, lease, or other possession of the same, shall be fined for the first offense not less than one hundred (100) dollars, and for the second offense shall be fined not less than five hundred (500) dollars and shall be confined in the county jail not less than six

(6) months, and for the third offense shall be fined not less than five hundred (500) dollars and shall be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years."

It is insisted that this statute is unconstitutional because the subject of it is "not sufficiently expressed within the title of the act," and that the title of the act limits its scope to the prohibition of the "use" of these devices for gambling purposes, and, therefore, that the mere ²⁵ "keeping" of such devices, even if prohibited by the statute, could not be punished, because that subject is not embraced in the title. This construction of the scope of the title of the act is altogether too narrow. Without entering into a protracted discussion as to the proper meaning of the word "keep," it will be sufficient to bear in mind a few general principles adopted by this court in construing the scope of such titles. "All matters are properly included in the act which are germane to the title. The constitution is obeyed if all the provisions relate to the one subject indicated in the title, and are parts of it or incident to it, or reasonably connected with it or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title, the doubt should be resolved in favor of the validity of the act": *Ritchie v. People*, 155 Ill. 98, 120; 46 Am. St. Rep. 315; *Fuller v. People*, 92 Ill. 182. In order to ascertain the true spirit and import of an act, the courts may also consider the mischiefs such act was designed to remedy: *Soby v. People*, 134 Ill. 66. The title of the act here in controversy is, "An act to prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes," and it is evident from the provisions of the act that the legislature endeavored to suppress absolutely the use of such devices for gambling purposes, even authorizing their seizure and destruction. It may well be said that making the operating, keeping, owning, renting, or using of such devices for gambling purposes punishable is one of the means convenient for the general subject "to prohibit the use" of such devices: *Fuller v. People*, 92 Ill. 182.

Section 2 of this act is claimed to be unconstitutional because it provides for the seizure and destruction of any of the machines and devices mentioned in the act, without ²⁶ making any provision for a hearing to determine whether or not the

property was lawfully taken and subject to destruction under the statute. This provision of section 2 is not involved in the determination of this case, and its construction is therefore immaterial here. It may be said, however, that proper proceedings to enforce it could be had under the general provisions in reference to searches and seizures found in division 8 of the Criminal Code: See *Glennon v. Britton*, 155 Ill. 232.

Counsel for plaintiff in error contend that the indictment is bad because time and place are not alleged of the "keeping" of the said device—that is to say, that the word "keep" should be preceded by the words "then and there." There is no merit in this contention. The indictment charges that Adam Bobel, on the first day of December, 1897, in said county of Cook and state of Illinois, unlawfully and willfully did, in a certain room, etc., keep a certain slot machine, etc. The allegations of time and place in the commencement are adverbial clauses modifying the verb "did keep." They immediately precede the auxiliary "did," which is separated from its principal verb "keep" by the intervening description and number of the room in which the slot machine was kept, and the repetition of those allegations by the words "then and there" immediately preceding the word "keep" would clearly be tautological and unnecessary. Time and place are distinctly alleged of the verb "keep," for there is no other word in the indictment which they can modify if they do not modify the word "keep."

It is next contended that the allegation descriptive of the purposes for which the slot machine was used is faulty. The indictment charges that plaintiff in error did "keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked." It is claimed that this last allegation should be, "upon the result of the action of which money or other valuable thing was ²⁷ then and there staked." The allegation of the indictment is in the language of the statute, and that is sufficient: *Fuller v. People*, 92 Ill. 182, and cases there cited. The clause, "upon the result of the action of which money or other valuable thing is staked," is descriptive of the uses of the machine, and the allegation in the indictment amounts to this: that the machine kept by plaintiff in error was, at the time and place of the keeping of the same, as laid, such a machine as was used for gambling purposes; and the whole indictment then was substantially a charge of keeping a machine which, at the time and place as laid, was one used for gambling purposes—that is, a charge of keeping a gambling machine.

Plaintiff in error contends that the mere keeping of such a gambling machine is not an offense under the statute; that to constitute the offense the machine must be actually used, or at least actually kept, for gambling purposes, and that the indictment does not charge that it was kept for gambling purposes, but merely charges that it was a machine of the kind used for gambling purposes; and the contention is, not only that the indictment should have been quashed, but that the court erred in admitting testimony not only descriptive of this slot machine, but that it was in fact, at the time and place mentioned, used for gambling purposes. We are satisfied, as before stated, that the indictment is good, and are also of the opinion that the testimony was properly received. If for no other purpose, this evidence was proper to prove the character and purpose of the machine—that is, that it was a device upon which money is staked or hazarded, or upon the result of the action of which money is staked, bet, hazarded, won, or lost; in other words, that it was a gambling device. The second section of the act declares such machines to be gambling devices.

While a plausible argument is made that in view of the phraseology of the statute, and especially of the ²⁸ title, the purpose of the act is not to prohibit the mere keeping or using of such a device but only the keeping or owning of the same to be used for gambling purposes, still it cannot be doubted that the legislature has the power to prohibit the mere keeping in possession of such gambling devices as well as to prohibit their use, as it has done in respect to obscene and indecent pictures, drawings, books, etc.: Crim. Code, sec. 223; 1 Starr and Curtis' Annotated Statutes, 816; Fuller v. People, 92 Ill. 182; and in respect to plates, dies, etc., made use of for counterfeiting: Crim. Code, sec. 113; 1 Starr and Curtis' Annotated Statutes, 786; Soby v. People, 134 Ill. 66. And we are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices or the keeping of them for gambling purposes, but also to prohibit the ownership or the keeping of them, whether for gambling purposes or not—otherwise, why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping, and why provide for their seizure and destruction? Nor can it be said that these provisions are not germane to the subject as expressed in the title, for it must be admitted that the enforcement of these provisions would be an effectual method of prohibiting their use for gambling purposes. They are de-

clared to be gambling devices, and their manufacture might be prohibited and their ownership as property also prohibited. If, as the statute provides, the mere ownership of such devices is a criminal offense, no reason is perceived why the mere keeping of them is not also made an offense. The purpose of the statute seems to be not only to prohibit the mere use, but to suppress such devices altogether by the means provided by the statute, even by destroying them.

We find no substantial error in the instructions complained of, and see no sufficient reason why the judgment should be reversed. It will therefore be affirmed.

Sufficiency of the Title to a Statute.*

Constitutional Provision.—In many of the states there is a constitutional provision that no act shall embrace more than one subject, and that shall be expressed in its title: See notes to Davis v. State, 61 Am. Dec. 337; Tuttle v. Strout, 82 Am. Dec. 110. Some of the state constitutions use the word "object" instead of "subject," and the subject or object must, under some constitutions, be "clearly" expressed in the title. This difference of wording, however, is unimportant, as it is seldom mentioned, and the paramount purpose, requiring the subject matter of an act to be expressed in such a way that it may be understood, is the same in all constitutions. It is not our purpose, in this note, to discuss at any length the question of duplicity, or to show when an act contains more than one subject, but we shall deal with such constitutional provision so far as it involves the sufficiency of the title to an act, by an expression, in the title, of the subject matter of the act.

The constitutional inhibition that a statute shall not embrace more than one subject is as emphatic as is the mandate that that subject shall be expressed in the title: Philpin v. McCarty, 24 Kan. 393; Ballentyne v. Wickersham, 75 Ala. 533. Hence, a statute embracing two subjects, both of which are expressed in the title, falls within the inhibition, and is unconstitutional and void: Ballentyne v. Wickersham, 75 Ala. 533. But, though there is more than one subject mentioned in an act, still if they are germane or subsidiary to the main subject mentioned in the title, or if relative directly or indirectly to the main subject, or so long as the provisions are of the same nature, and come legitimately under one subject or denomination, the act is constitutional and valid: Fahey v. State, 27 Tex. App. 146; 11 Am. St. Rep. 182. In other words, under a constitutional provision that a statute shall not embrace more than one subject, and that shall be expressed in its title, there may be included in a statute means reasonably adapted to secure the objects indicated by the title. When the general purpose is declared in the title the means for its accomplishment pro-

* REFERENCE TO MONOGRAPHIC NOTES.

An act must embrace but one subject which shall be expressed in its title: 61 Am. Dec. 337-346; 25 Am. Rep. 239-246.

vided by the act are presumed to be intended as necessary incidents: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304. It is only in a case perfectly plain that a court is justified in vacating a statute on the ground that its object is not expressed in its title. The mere fact that the object of an act might, with propriety, be expressed more specifically in its title than the legislature saw fit to do is no reason for declaring it void, so long as the title fairly points out the subject of the legislation: *Anderson v. Camden*, 58 N. J. L. 515, 518. If the subject of an act is expressed in its title, the constitution is satisfied: See collected cases in note to *Davis v. State*, 61 Am. Dec. 343; *Hargrave v. Weber*, 66 Mich. 59; *People v. Phippin*, 70 Mich. 6; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485; *State v. Brown*, 41 La. Ann. 771; *Nason v. Directors of the Poor*, 126 Pa. St. 445; *Bush v. Indianapolis*, 120 Ind. 476. Otherwise, it is not: *In re Hauck*, 70 Mich. 396; and the statute must be declared unconstitutional and void: *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512. The legislature cannot, by simply declaring a private act to be a public law, evade the effect of a constitutional provision declaring that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title"; *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589. So, if the title of a statute is sufficiently comprehensive to embrace all its provisions, the fact that certain sections are subsequently disregarded as unconstitutional does not make the remaining sections unconstitutional on the ground that the title is not broad enough to include such sections: *Jolliffe v. Brown*, 14 Wash. 155; 53 Am. St. Rep. 868.

It may be stated, as a general rule, that if the subjects embraced in a statute, but not specified in its title, have congruity or are naturally connected with the subjects stated in the title, or are cognate or germane thereto, it does not embrace more than one object: *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 795; *Ballentyne v. Wickersham*, 75 Ala. 533. Hence, a statute, having, as its object, the suppression of gambling upon the speed or endurance of animals, may make unlawful and provide for punishing every device for making, receiving, forwarding, or registering any bet or wager upon the speed or endurance of animals: *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 795. If the title of an act declares that it is "an act to define who are fellow-servants and who are not fellow-servants," such title does not contain two subjects: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878. The title of an act does not express more than one subject when it, in addition to the general subject, expresses a minor subdivision which, without such expression, would be held to be included within the general subject: *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652. Two distinct subjects are not expressed in the title of a statute entitled, "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same." The regulation of such use necessarily implies the right to punish an improper use: *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652. "Where all the provisions of a statute fairly relate to the

same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid": Ewing v. Hoblitzelle, 85 Mo. 64, 71, quoting from Sedgwick on Statutory and Constitutional Law, 521.

Nature of Constitutional Provision.—The constitutional requirement that a statute shall not embrace more than one subject, which shall be expressed in its title, has been held merely directory, as relating only to bills in their progress through a legislative body: Weil v. State, 46 Ohio St. 450; but the almost uniform rule is that such requirement is mandatory: Note to Davis v. State, 61 Am. Dec. 340; Philpin v. McCarty, 24 Kan. 393; State v. Yardley, 95 Tenn. 546; In re Breene, 14 Colo. 401; Ballentyne v. Wickersham, 75 Ala. 533; and that a statute which disregards it must be declared void: Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co., 86 Va. 1; 19 Am. St. Rep. 858.

The Object or Purpose of the constitutional provision under consideration was to avoid surprise and fraud upon the legislators and people in the enactment of laws. The clause prohibiting more than one subject to be embraced in a statute was to interdict "log-rolling" legislation, for experience had shown that measures, having no common purpose, and each wanting sufficient support on its own merits to secure its enactment, were frequently and successfully carried through legislative bodies, and became laws, when neither measure could command the approval of such bodies; and the clause requiring the subject of the act to be expressed in its title was adopted for the purpose of informing the members of the legislature, and perhaps the public, or those specially interested, of the subject on which the former were invited to vote and legislate, as matters foreign to the main object of laws had sometimes found their way into bills, surreptitiously, at times, it was charged, and thus the members were induced to vote for measures in ignorance of what they were doing. This is clearly shown in the note to Davis v. State, 61 Am. Dec. 338; Ballentyne v. Wickersham, 75 Ala. 533; In re Breene, 14 Colo. 401; Hotchkiss v. Marion, 12 Mont. 218, 226; Thomas v. Collins, 58 Mich. 64; Attorney General v. Weimer, 59 Mich. 580; Rogers v. Manufacturers' Imp. Co., 109 Pa. St. 109; State v. Young, 47 Ind. 150, 173; Garvin v. State, 13 Lea, 162; Philadelphia v. Ridge Avenue Ry. Co., 142 Pa. St. 484; 24 Am. St. Rep. 512; Paxton etc. Land Co. v. Farmers' etc. Land Co., 45 Neb. 884; 50 Am. St. Rep. 585.

A Liberal Construction is given to the constitutional provision requiring an act to embrace but one subject, which shall be embraced in its title. The mandate of the constitution should not be so exactly enforced, or in such a manner as to cripple legislation; yet it should be so enforced as to guard against the evils intended to be remedied thereby. It is, therefore, enough if an act contains one general subject and that subject is expressed, though in general terms, in the title. The court should not, on the one hand, be so hypercritical as to require every matter of detail to be stated in the title, nor, on the other hand, so liberal as to render the constitutional provision nugatory. The alleged

insufficiency of the title should be tested candidly and justly and a liberal interpretation be given: *Lacey v. Palmer*, 93 Va. 150; 57 Am. St. Rep. 795; *Tabor v. State*, 34 Tex. Crim. Rep. 631; 53 Am. St. Rep. 726; *State v. Roby*, 142 Ind. 168; 51 Am. St. Rep. 174; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; notes to *Tuttle v. Strout*, 82 Am. Dec. 110; *Davis v. State*, 61 Am. Dec. 339; *Ballentyne v. Wickersham*, 75 Ala. 533; *Hotchkiss v. Marion*, 12 Mont. 218, 226; *Boyle v. Vanderhoof*, 45 Minn. 31; *People v. Goddard*, 8 Colo. 432; *Dallas v. Redman*, 10 Colo. 297; *McGurn v. Board of Education*, 133 Ill. 122; *State v. Barrett*, 27 Kan. 213; *Board of Commrs. v. State*, 36 Kan. 337; *Philpin v. McCarty*, 24 Kan. 393; *In re Breene*, 14 Colo. 401; *Attorney General v. Weimer*, 59 Mich. 580; *In re Pratt*, 19 Colo. 138; *In re Hauck*, 70 Mich. 396. A strict compliance with the constitutional provision is unnecessary: *State v. Young*, 47 Ind. 150, 173; *Anderson v. Baker*, 23 Md. 531, 586; *Mayor v. State*, 30 Md. 112, 118. The legislature, having acted in the selection of a title for a statute, its power to do so, and to embrace legislation within such caption, is construed liberally in favor of the constitutionality of the enactment: *Tabor v. State*, 34 Tex. Crim. Rep. 631; 53 Am. St. Rep. 726; *State v. Nomland*, 3 N. Dak. 427; 44 Am. St. Rep. 572. The provision should be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical and natural connection: *Johnson v. Harrison*, 47 Minn. 575; 28 Am. St. Rep. 382; and it is a general rule of constitutional law, applicable particularly in construing the titles of laws, that statutes must be held constitutional unless they are clearly void: *State v. Camp Sing*, 18 Mont. 128; 56 Am. St. Rep. 551; *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513; 55 Am. St. Rep. 149; *State v. Roby*, 142 Ind. 168; 51 Am. St. Rep. 174.

Generality of Title, in a statute, is unobjectionable, if the title covers the subject, and the form of it is immaterial. In fact, all that is required is for the title to indicate the subject of the act, in a general way, without entering into details, as all auxiliary provisions which properly attach to the main subject, and form part of it, may be embraced within the enactment: *Donnersberger v. Prendergast*, 128 Ill. 229; *People v. Blue Mountain Joe*, 129 Ill. 370; *People v. Nelson*, 133 Ill. 565; *Ex parte Livingston*, 20 Nev. 282; *Mortland v. Christian*, 52 N. J. L. 521; *In re Knaust*, 101 N. Y. 188, 194; *State v. Bockstruck*, 136 Mo. 335; *State v. Brown*, 41 La. Ann. 771; *People v. Dobbins*, 73 Cal. 257; *State v. Miller*, 100 Mo. 439; *Attorney General v. Rice*, 64 Mich. 385; *State v. Wilson*, 12 Lea, 246; *Ballentyne v. Wickersham*, 75 Ala. 533; *Ramagnano v. Crook*, 85 Ala. 226; but a general title cannot be used to conceal legislation incongruous in itself, or which by no fair intendment can be considered as having a necessary or proper connection with the title: *Lynch v. Murphy*, 119 Mo. 163; *State v. Yardley*, 95 Tenn. 546. So long, however, as a general title is not used as a cloak for legislating upon different matters, or where incongruous matters are not joined, it is sufficient: *St. Louis v. Green*, 7 Mo. App. 468.

The Title and Act Must Substantially Correspond, in order to make a law constitutional on the ground that its subject is expressed in

its title. If clauses are contained in an act which are not so correlated to the subject expressed in the title, as to appear to follow as a natural and legitimate complement, they cannot stand: *Ballentyne v. Wickersham*, 75 Ala. 533; *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135; *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707; *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235, and extended note thereto. The title of a statute and the act itself must correspond, not literally, but substantially, and this correspondence is to be determined in view of the subject matter to which the legislature relates; and when the title of an act indicates that a thing is to be or may be done, it is no variance from it for the body of the act to provide that the thing shall be done, or not done, on some condition: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135.

The Title of an Act Must Express the subject matter of the statute, or the act is void: *State v. Nomland*, 3 N. Dak. 427; 44 Am. St. Rep. 572; *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512; *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652; *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *Rogers v. Manufacturers' Imp. Co.*, 109 Pa. St. 109. If the title imports one subject, while the statute itself shows a different subject to be its purpose, the title is misleading, and the act is unconstitutional on the ground that its subject is not expressed in its title: *Rogers v. Manufacturers' Imp. Co.*, 109 Pa. St. 109.

The Title of an Act Need not Contain Details.—It need not be a complete index to the provisions of the statute, but the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to the members of the legislature and to others specially interested. The title need not express all of the minor divisions of the general subject to which the act relates. It need not contain a synopsis of the law, or an abstract of its contents: *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 14 Am. St. Rep. 512; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652; *Martin v. Broach*, 6 Ga. 21; 50 Am. Dec. 306; *People v. Superior Court*, 100 Cal. 105; *Ballentyne v. Wickersham*, 75 Ala. 533. It would be dangerous as well as unreasonable to hold that each and every subdivision of a general subject must be specifically mentioned in the title: *Edwards v. Denver etc. R. R. Co.*, 13 Colo. 59. It is not required that all the "matters properly connected" with the principal subject matter of the act shall be expressed in its title, but only that principal subject: *Reed v. State*, 12 Ind. 641. It is not important that all of the various objects of a statute should be expressly stated in its title, or that the law itself indicates objects not mentioned in the title, if they are not variant from the object expressed in the title, but are referable and cognate to it: *State v. Madson*, 43 Minn. 438. The different steps by which the purpose of an act is to be accomplished are not different subjects, but minor parts of the same subject: *Klein v. Kinkead*, 16 Nev. 194. It is unnecessary to indicate in the title of a law any punishment for a violation of its

provisions: *People v. Miller*, 88 Mich. 383; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485.

The Title of an Act is Sufficient if the provisions of the act are germane to the general subject expressed in its title. When the general purpose is declared in the title, the means for its accomplishment, provided by the act, are presumed to be intended as necessary incidents; and, if the subject is properly expressed in the title, the act may, without violating the title, create the means and instrumentalities required for its own accomplishment: *People v. Kirk*, 162 Ill. 138; 53 Am. St. Rep. 277; *Jones v. Aspen Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220; *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884; 50 Am. St. Rep. 585; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98; *State v. Nomland*, 3 N. Dak. 427; 44 Am. St. Rep. 572; *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304; *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878; *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195; *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308; *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512; *Winona v. School Dist.*, 40 Minn. 13; 12 Am. St. Rep. 687; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 213; *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602; *Martin v. Broach*, 6 Ga. 1; 50 Am. Dec. 306; *San Antonio v. Mehaffy*, 96 U. S. 312; *Walnut v. Wade*, 103 U. S. 683, 692; *Unity v. Burrage*, 103 U. S. 447; *Gayle v. Owen County Court*, 83 Ky. 61; *Burnside v. Lincoln County Court*, 86 Ky. 423; *Hellman v. Shoulters*, 114 Cal. 136; *Mississippi etc. R. R. Co. v. Wooten*, 36 La. Ann. 441; *State v. Henderson*, 32 La. Ann. 779; *Mollie Gibson etc. Co. v. Sharp*, 23 Colo. 259; *In re Breene*, 14 Colo. 401; *San Antonio v. Lane*, 32 Tex. 405; *State v. Laughlin*, 75 Mo. 358; *State v. Morgan*, 112 Mo. 202; *Lynch v. Murphy*, 119 Mo. 163; *O'Leary v. County of Cook*, 28 Ill. 534, 542; *Erlinger v. Boneau*, 51 Ill. 94; *Burke v. Monroe County*, 77 Ill. 610; *Abington v. Cabeen*, 106 Ill. 204, 206; *Montgomery etc. Assn. v. Robinson*, 69 Ala. 413; *Dyker Meadow Land etc. Co. v. Cook*, 3 N. Y. App. Div. 164; *Ballentyne v. Wick-ersham*, 75 Ala. 533; *Van Brunt v. Flatbush*, 128 N. Y. 50; *Klein v. Kinkead*, 16 Nev. 194; *Ex parte Bacot*, 36 S. C. 125, 135; *Kansas City etc. R. R. Co. v. Frey*, 30 Neb. 790; *State v. Mines*, 38 W. Va. 125; *State v. Barrett*, 27 Kan. 213; *San Antonio v. Lane*, 32 Tex. 405.

If the subject is clearly expressed in the title, the title is not insufficient because of any provisions, in the body of the act, that are germane to the subject expressed in the title, or that would be naturally suggested by it as necessary or proper to a complete accomplishment of the purpose it discloses: *Tabor v. Commercial Nat. Bank*, 62 Fed. Rep. 383, 387; *State v. Mines*, 38 W. Va. 125; *Burke v. Monroe County*, 77 Ill. 610; *San Antonio v. Mehaffy*, 96 U. S. 312, 315. It being sufficient that the title express the general subject of the act, all minor subdivisions germane to the general subject will be held to be included in it: *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652. If the title clearly and distinctly expresses the whole object of the legislature in the enactment, and

there is nothing in the body of the act which is not germane to what is there expressed, the title is sufficient: *Carter County v. Sinton*, 120 U. S. 317; *Burnside v. Lincoln County Court*, 86 Ky. 423. The title is sufficient if the things regulated or forbidden in the body of the act fall within the generic purpose expressed in the title, and relate to it. Details are matters of legislative, not of judicial, discretion, within these limits: *State v. Stripling*, 113 Ala. 120, 122; *Ballentyne v. Wickersham*, 75 Ala. 533. A statute is not open to the objection that it contains subjects not "clearly" expressed in its title, when such subjects are all "referable and cognate" to the subjects expressed in such title: *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection or relation to each other. All that is necessary, under a constitutional prohibition against enacting laws which embrace more than one subject, is, that the act shall embrace some one general subject; and by this is meant merely that all matters treated of should fall under some one general idea, and be so connected with, and relate to, each other, either logically or in popular understanding, as to be parts of, and germane to, some one general subject: *Johnson v. Harrison*, 47 Minn. 575; 28 Am. St. Rep. 382. The title of an act is sufficient, if it fairly expresses the subject matter in such a manner as to convey to the mind an indication of the subject to which it relates: *In re Application of Department of Public Parks*, 86 N. Y. 437; and it should be construed in its most comprehensive and liberal sense favorable to the validity of the act, so as to bring the contents of the act within the title. It is only in cases where the contents of the act are manifestly not within its title that the act, or any part of it, should be deemed void: *State v. Mines*, 38 W. Va. 125.

Void Provisions.—So much of an act as is not covered by its title, or which is not germane to the subject expressed in the title, is without force and void: *People v. Goddard*, 8 Colo. 432; *Wulftange v. McCollom*, 83 Ky. 361; *Touzalín v. Omaha*, 25 Neb. 817; *State v. Murray*, 41 Minn. 123; *Brooks v. Hydorn*, 76 Mich. 273; *Eaton v. Walker*, 76 Mich. 579; *Ballentyne v. Wickersham*, 75 Ala. 533. Thus, if the subject matter of a statute is composed of two or more essential elements, one only of which is expressed in its title, it is insufficient under a constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." For example, if one of the objects of the subject matter of an act is to collect funds from foreign insurance companies, and another object is to dispose of such funds for the relief of firemen, the expression of one only of such objects in the title of the act renders the statute void: *Henderson v. London etc. Ins. Co.*, 135 Ind. 23; 41 Am. St. Rep. 410. Laws passed for one purpose, and under one title or category, cannot be made to do duty, under a foreign enactment, which was not in any way within their contemplated range: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438.

Void in Part not Void in Toto.—So much of an act as is expressed in its title is valid, but the remainder is void. Otherwise stated, the provisions of a law touching the subject, which is expressed in the title, must stand. Those relating to other subjects, not expressed in the title, alone fall. This is the general rule, but, of course, can only be applied where the parts germane are severable from those which are not: See note to *Davis v. State*, 61 Am. Dec. 341, and cases there collected; *Unity v. Burrage*, 103 U. S. 447, 458; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *Savannah etc. Ry. Co. v. Geiger*, 21 Fla. 669; 58 Am. Rep. 697; *Northwestern Mfg. Co. v. Wayne Circuit Judge*, 58 Mich. 381; 55 Am. Rep. 693; *State v. Trolson*, 21 Nev. 419, 429; *State v. Woodmansee*, 1 N. Dak. 246; *Shivers v. Newton*, 45 N. J. L. 469; *State v. Young*, 47 Ind. 150, 173; *Taylor v. Kirby*, 31 Ill. App. 658; *Ballentyne v. Wickersham*, 75 Ala. 533; *Ramagnano v. Crook*, 85 Ala. 226; *Ritchie v. Richards*, 14 Utah, 345. These cases show that if a statute is broader than its title, the part within the title can stand, while the parts not indicated thereby must be denied effect: *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 795; *Taylor v. Kirby*, 31 Ill. App. 658. The unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute. If the defect renders inoperative other provisions of the statute, the entire act is, of course, null and void: *McPherson v. Blacker*, 92 Mich. 377; 31 Am. St. Rep. 587; *State v. County Commrs.*, 47 Neb. 428; *Ritchie v. Richards*, 14 Utah, 345; but, if a statute contains valid and invalid provisions, and the invalid parts can be stricken from the act and leave an enactment complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected, the enactment will be upheld and enforced as to that which is valid: *Harper v. State*, 109 Ala. 28, 32. It has, however, been held that if an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity: *Raglio v. State*, 86 Tenn. 272, 275; *Taylor v. Kirby*, 31 Ill. App. 658; *State v. McCann*, 4 Lea, 1.

Comprehensive and Restrictive Titles—Other Matters.—There is no objection to a comprehensive title, and the legislature may, within reason, make the title of a bill as comprehensive as it chooses: *In re Breene*, 14 Colo. 401; *Donley v. Pittsburg*, 147 Pa. St. 348; 30 Am. St. Rep. 738; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; *Ballentyne v. Wickersham*, 75 Ala. 533, 536. The breadth and comprehensiveness of a title are matters of legislative discretion: *Woodruff v. Baldwin*, 23 Kan. 491, 494. Comprehensive titles are not forbidden by the constitution: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884; 50 Am. St. Rep. 585.

The legislature has the right to choose the title of an act passed by it: *In re White*, 33 Neb. 812; and it may be as broad and com-

prehensive as the legislature may choose to make it; or it may be as narrow and restricted as that body may choose to make it. It may be broad enough to include innumerable minor subjects, if they can be so combined and united as to form only one grand and comprehensive subject; or it may be so narrow and restricted as to include only the smallest and minutest subject: *State v. Barrett*, 27 Kan. 213, 217. If the legislature selects a restrictive and limited title, the courts can neither enlarge nor amend it: *State v. Palmes*, 23 Fla. 620; *State v. Bankers' etc. Assn.*, 23 Kan. 499. The title to an act may be so restrictive as to exclude matters which might have been embraced in one enactment with the matters indicated in the title. In such case, the matter excluded by the restrictive words of the title cannot be inserted in the body of the statute without making it void: *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *State v. Palmes*, 23 Fla. 620; *In re Breene*, 14 Colo. 401. If the language of the title is, in terms, limited to provisions concerning elections, provisions concerning appointments to office cannot be included in the law, but, if they are included, those provisions concerning elections will stand while those relating to appointments must fall, unless they are so dependent on each other that they cannot be executed separately: *Ritchie v. Richards*, 14 Utah, 345, 358.

The use of the term, "and so forth," cannot enlarge the meaning of other words employed in the title of an act, nor supply any omission therein: *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 795. *Contra*, *Garvin v. State*, 13 Lea, 162. Neither does the abbreviation, "etc.," in the title of an act, add anything to its scope or effect. It serves no purpose: *State v. Arnold*, 140 Ind. 628. *Contra*, *Garvin v. State*, 13 Lea, 162. And the same is true of the "cure-all" phrase, "and for other purposes": *Note to Davis v. State*, 61 Am. Dec. 345; *Board of Education v. Barlow*, 49 Ga. 232, 241; *Glenn v. Lynn*, 89 Ala. 608, 611. *Contra*, *Black v. Cohen*, 52 Ga. 621, 626, 627. So with the words, in a title, "certain powers and privileges": *Glenn v. Lynn*, 89 Ala. 608, 611. Misplaced quotation marks in the title of an act do not vitiate the title when the sense is clear, as the court will make the proper change: *Commonwealth v. Taylor*, 159 Pa. St. 451.

Amendatory Acts.—The subject of an act is sufficiently expressed in its title when it is to amend a pre-existing act, the title of which is recited verbatim in the title of such amendatory act: *Wilson v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626; *People v. Dobbins*, 73 Cal. 257; *Dyker Meadow Land etc. Co. v. Cook*, 3 N. Y. App. Div. 164; although the year of the enactment of the original act is not mentioned: *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626. But, if the subject of an amendatory enactment is expressed in its title, it is not necessary to state in the title, the effect of the subject matter, as its amending or repealing some prior law: *Timm v. Harrison*, 109 Ill. 593. A title of an amendatory act is sufficient if it indicates the act to be amended and its subject matter: *People v. Whitlock*, 92 N. Y. 190, 197; *State v. Brown*, 41 La. Ann. 771;

State v. Runnels, 92 Tenn. 320; *Ransome v. State*, 91 Tenn. 716; *Muldoon v. Levi*, 25 Neb. 457; *Dyker Meadow Land etc. Co. v. Cook*, 3 N. Y. App. Div. 164; *McCalla v. Bane*, 45 Fed. Rep. 828; *Martin v. Johnson*, 33 Fla. 287. Under the title of an act to amend an act, etc., the legislature may substitute, for a law complete in itself, another law of similar complete characteristics, and, if its provisions are germane to the title and subject of the act amended, it is valid, although it operates incidentally to modify other statutes: *Henry v. Ward*, 49 Neb. 392, 396.

The rule as to the title and matters of an original act applies to an amendatory act. If the title of the first act is broad enough to cover the matters embraced by the amendatory act, it is unnecessary to inquire whether the title of the amendatory act would itself be sufficient, for, if the title of the first act is broad enough to have covered new matters of the amendatory act, it is enough, even though the title of the amendatory act be not broad enough. Of course, the new matters brought in by the amendment must not be foreign to the subject of the prior legislation, but congruous and germane to it, such as might have been put into that legislation under the original title, in the case of a separate act: *Roby v. Sheppard*, 42 W. Va. 286, 290. A statute amending another by mere implication need not refer to the statute it so amends, either in its title or body. It is valid if its title is sufficient to cover its own matters: *Roby v. Sheppard*, 42 W. Va. 286, 291.

If the title of an act states that the subject of it is to amend one section of a former statute, the act cannot be extended to the amendment of other sections: *Ex parte Hewlett*, 22 Nev. 333; and a provision in an amendatory act repealing a statute not connected with the subject of the amendment is void: *State v. Lancaster County*, 17 Neb. 85. No amendment can be enacted, under the title of an act to amend a certain other act, which is not germane to the subject of the original act: *Trumble v. Trumble*, 37 Neb. 340. See, also, *Adams v. San Angelo etc. Co.*, 86 Tex. 485; note to *Winona v. School Dist.* 12 Am. St. Rep. 696. Acts expressly amendatory must conform to the constitutional requirements: *State v. Trenton*, 53 N. J. L. 566; *Shelton v. State*, 96 Tenn. 521. An act entitled, "An act to regulate the sale of spirituous liquors," etc., was amended by adding a new section prohibiting absolutely the sale of such liquors within certain specified limits. This amendment was held not to be embraced in the title of the original act, and therefore unconstitutional and void: *People v. Gadway*, 61 Mich. 285; 1 Am. St. Rep. 578. Compare *Barnhill v. Teague*, 96 Ala. 207.

The title of an act which revises or amends an act by mere reference to its title is sufficient: *Hyman v. State*, 87 Tenn. 109; *Burnett v. Turner*, 87 Tenn. 124; *State v. Algood*, 87 Tenn. 163; *Dolese v. Pierce*, 124 Ill. 140; *State v. Babcock*, 23 Neb. 128; except where such an amendment is forbidden by the constitution as it is in some of the states: *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627; *Loomis v. Runge*, 66 Fed. Rep. 856. But in the following cases are discussed amendments which have been

held not to violate the constitutional provision prohibiting an amendment by mere reference to title: *Morrison v. St. Louis etc. Ry. Co.*, 96 Mo. 602; *State v. American etc. Mfg. Co.*, 50 N. J. L. 75; *State v. Phenline*, 16 Or. 107; *Watkins v. Eureka Springs*, 49 Ark. 131; *Timm v. Harrison*, 109 Ill. 593; *Peed v. McCrary*, 94 Ga. 487; *Denham v. Holeman*, 26 Ga. 182; 71 Am. Dec. 198; *State v. Halbert*, 14 Wash. 306, 310; *Marston v. Humes*, 3 Wash. 267.

The constitutional requirement that the subject of an act shall be expressed in its title is satisfied where an act, amending a certain chapter and section, or sections of the code, or any other act, specifically refers, in its title, to the chapter and section or sections of the code, or the act amended: *Roby v. Sheppard*, 42 W. Va. 286, 290; *State v. Heege*, 135 Mo. 112; *Miller v. Hurford*, 13 Neb. 13, 19; *Heath v. Johnson*, 36 W. Va. 782; *McCalla v. Bane*, 45 Fed. Rep. 828; *Muldoon v. Levi*, 25 Neb. 457; *Ransome v. State*, 91 Tenn. 716; *State v. Runnels*, 92 Tenn. 320; *State v. Brown*, 41 La. Ann. 771; *Bush v. Indianapolis*, 120 Ind. 476; *State v. Phenline*, 16 Or. 107; *People v. Judge of Superior Court*, 39 Mich. 195; *Tabor v. State*, 64 Tex. Crim. Rep. 631; 53 Am. St. Rep. 726; *Marston v. Humes*, 3 Wash. 267; *State v. Halbert*, 14 Wash. 306, 310; *Dogge v. State*, 17 Neb. 140; *Ex parte Howe*, 26 Or. 181; *Callaghan v. Chipman*, 59 Mich. 610. Contra, *Harland v. Territory*, 3 Wash. Ter. 131; *Rumsey v. Territory*, 3 Wash. Ter. 332 a; *Webster v. Powell*, 36 Fla. 703. The amending act, however, is, of course, void, if it does not refer, in its title, to the section or act amended: *Morgan v. State*, 48 Neb. 798.

A title is necessary only in cases of ordinary legislation. It is not essential to a bill or provision to amend a constitution and may be disregarded: *In re Senate File*, 25 Neb. 864, 882.

Supplementary Acts.—If the title of an original statute fully expresses the subject of the enactment, and an act, entitled a supplement thereto, has a title, sufficiently expressing the subject of the original act, and the provisions of the supplement are germane to the subject of the original, the title of the supplementary act is sufficient: *In re Pottstown Borough*, 117 Pa. St. 538, 546; *Millvale v. Evergreen Ry. Co.*, 131 Pa. St. 1; *Washington v. McGeorge*, 146 Pa. St. 248; *Commonwealth v. Taylor*, 159 Pa. St. 451; *Loomis v. Runge*, 66 Fed. Rep. 856; *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512.

Repealing Acts.—The repeal of a statute on the same subject need not be stated in the title of a statute: Note to *Gabbert v. Jeffersonville R. R. Co.*, 11 Ind. 365; 71 Am. Dec. 359; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214; *Tim v. Harrison*, 109 Ill. 593; but the title to an act is no part of the bill, and cannot alone repeal an existing law: *Brooks v. Hydorn*, 76 Mich. 273. The constitutional requirement that the subject of an act shall be expressed in its title is not violated because of the fact that the title does not mention other acts which the statute repeals or alters by implication on account of repugnancy or inconsistency, if all its provisions are germane to the subject expressed in the title: *Winona*

v. School Dist., 40 Minn. 13; 12 Am. St. Rep. 687. See, also, on the subject of repeal: *Timm v. Harrison*, 109 Ill. 593; *Wallace v. Bradshaw*, 53 N. J. L. 315.

Acknowledgments.—An amendment of a statute, relating to the officers before whom acknowledgments may be taken, and their powers, is inoperative, where there is no hint in the title of the act of a purpose to change the manner of taking acknowledgments, the officers before whom they may be taken, or the jurisdiction or power of such officers. An attempt to remodel the law relating to acknowledgments, under a title indicating an intention to change the time for recording deeds is an attempt to do that of which the title not only gives no notice, but against which it closes the door by asserting a different purpose: *Davey v. Ruffel*, 162 Pa. St. 443, 451.

Adoption.—A constitutional provision requiring the object of an act to be expressed in its title is plainly violated, where the purpose of the act is the adoption of a minor child as an heir at law, and the title looks only to a change of the name of minor adopted children and other persons: *People v. Congdon*, 77 Mich. 351, 358.

Adulteration.—The title, "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof," sufficiently describes the subject of a legislative act which prohibits the sale of any article for use as lard that contains any ingredient but the pure fat of healthy swine, unless it is labeled "compound lard," and designates the name and proportion of each ingredient contained therein: *State v. Snow*, 81 Iowa, 642. The provisions of the Minnesota statute, "To prohibit and prevent the sale or manufacture of unhealthy or adulterated dairy products," are legitimately connected with the subject of the act, and included therein, and are not, therefore, open to the constitutional objection that they are not expressed in the title: *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638. An act entitled, "An act prohibiting the coloring yellow of any substance designed to be used as a substitute for butter; to prohibit the manufacture, sale, keeping for sale, and fraudulent use of substances designed as imitation butter; to regulate the manufacture, sale, and keeping for sale of any substance designed to be used as a substitute for butter and making an appropriation for carrying out the provisions" of the act, sufficiently expresses in the title, the subject of the act, so as to include a section of the act requiring such substitutes to be marked in a certain manner, and providing that persons having them in their possession unmarked will be presumed to have known their character: *State v. Bockstruck*, 136 Mo. 335.

But it is not competent to use one title as to such matters, and to explain in the body of the act that it means something else. A title, "To prevent deception in the manufacture and sale of dairy products, and to preserve the public health," does not cover provisions in the act forbidding the manufacture and sale of any pro-

ducts in the semblance of butter not made exclusively of milk or cream, and providing that the state shall purchase the machinery now used in such manufacture, and that the state auditors shall allow the sum judicially decreed to be paid therefor. Such a title violates the constitutional rule requiring the title of an act to contain its object, where the act contains such provisions. And if the addition of the words, "and to preserve the public health," was meant to cover anything more than deception in the "manufacture and sale of dairy products," it would render the title double, and thus avoid the whole statute for duplicity: *Northwestern Mfg. Co. v. Wayne* Circuit Judge, 58 Mich. 381; 55 Am. Rep. 693. So that part of an act "to prevent the adulteration and to regulate the sale of milk," which prohibits the production of impure milk by other means than by adulteration, without regard to the existence of an intent to sell the same, is unconstitutional, on the ground that it is legislation on a matter not within the object expressed in the title of the act: *Shivers v. Newton*, 45 N. J. L. 469.

Animals.—If the purpose of an act is to protect the ownership of livestock, the act may contain a section providing a penalty for the theft of stock, as it furnishes an effective and appropriate means of protecting the ownership. Hence, a title, "To provide for the branding, herding, and care of livestock, and to repeal certain acts in relation thereto," is not open to objection on the constitutional ground that the object is not expressed in the title. On the contrary, the means furnished for the protection of the stock is germane to the subject expressed in the title: *In re Pratt*, 19 Colo. 138. So, if the purpose of an act is to restrain livestock from running at large in the territory embraced in the limits of several counties, the act may contain all reasonable and proper means for carrying the object into effect, such as leaving it to a vote whether the stock in certain portions of such territory shall be "kept up." Hence, if the title of the act is "to prevent domestic animals from running at large" in the counties named, it does not offend a constitutional requirement that a local law shall embrace but one subject, which shall be expressed in its title; and the title applies to each precinct of each county. Neither can it be urged that each county is a subject, and being more than one, the law should be held unconstitutional. Each county and each precinct of each county is embraced within the object expressed in the title, and, as the provisions adopted are germane to the scope of the act, they are embraced in the subject named in the title, and the law is valid and binding: *Erlinger v. Boneau*, 51 Ill. 94, 99. But the title of an act "regulating the herding and driving of stock," is not comprehensive enough to authorize a provision in the act allowing damages, in certain cases, for the castration of animals. The provision for a penalty is, therefore, void: *Ives v. Norris*, 13 Neb. 252.

Appeals—Writs of Error.—The provisions of an act, "To provide for appeals from interlocutory orders granting injunctions or ap-

pointing receivers," beyond what is expressed in the title of the act, are void: *Taylor v. Kirby*, 31 Ill. App. 658. An act whose title relates to "writs of error" is unconstitutional on the ground that the title does not express the object of the act, if the function of the law is the removal of decisions founded on blended law and fact, a function that in no sense appertains to writs of error: *Falkner v. Dorland*, 54 N. J. L. 409.

Appropriations.—A legislative provision for the payment of a "debt" may be constitutionally made under a title expressing provision for "expenses," as the two subjects "debts" and "expenses" are sufficiently germane and connected to sustain the validity of the act: *State v. State Auditor*, 32 La. Ann. 89.

Assessments.—Revolutionary changes cannot be made in general tax laws, providing "for the assessment of property and levy and collection of taxes thereon," under a title which has, apparently, no bearing on them: *Thomas v. Collins*, 58 Mich. 64. A statute entitled, "An act in relation to regulating and grading the Eighth avenue in the city of New York," does not authorize an assessment for grading an intersecting street, as the improvement or alteration in any mode of the intersecting streets is not fairly or reasonably connected with the improvement or regulating of Eighth avenue, nor would any measures adopted in reference to those streets facilitate the accomplishment of the purpose expressed in the act. The subject matter of the statute permitting such an assessment is foreign to that indicated by the title, and the act in that respect must be pronounced invalid: *In re Blodgett*, 89 N. Y. 392, 396.

But the constitutional requirement that the subject of an act shall be expressed in its title is not violated by a title which relates "to assessments in township," if the statute provides a mode of levying assessments in townships: *Van Riper v. North Plainfield*, 43 N. J. L. 349; or by a title "relating to the assessment of real property in the city of Brooklyn, county of Kings, owned and occupied by charitable corporations, societies, or institutions," if the act declares that real property situate in the county of Kings then or thereafter owned by any hospital, orphan asylum, house of industry, or other charitable corporation, society, or institution, shall be exempt from all assessments for local improvements: *Dyker etc. Land Co. v. Cook*, 3 N. Y. App. Div. 164. The title, "An act relative to the powers and duties of the commissioners of Central Park," expresses the subject of the act, where each section of the act defines a power or prescribes a duty of the commissioners and includes no matter not intrusted to them: *In re Knaust*, 101 N. Y. 188, 194.

Banking.—The constitutional requirement that the subject of an act shall be expressed in its title is not violated by a title, "An act to provide for the organization and government of state banks," where the act prohibits all persons from doing a banking business in the state, with certain exceptions: *State v. Woodmansee*, 1 N. Dak. 246; or by a title, "to establish state depositories in the cities

of Atlanta (and other cities named) and to prescribe their duties and liabilities," although the body of the act provides for the giving of bonds by the depositories, to be enforced, in case of default, in like manner as those of state treasurers are enforced: *Seay v. Bank of Rome*, 66 Ga. 609. The title, "An act creating a board of bank commissioners, and prescribing their duties and powers," is sufficiently general in its scope to express the subject of the act, where the act contains no matter not germane to the subject expressed in the title: *People v. Superior Court*, 100 Cal. 105. The fact that the limit on the taxing power of the state over the Georgia Railroad and Banking Company is not expressed or indicated in the title of the act of incorporation does not render that provision of the charter unconstitutional: *Goldsmith v. Georgia R. R. Co.*, 62 Ga. 485. An act entitled, "An act concerning bank officers, brokers, etc., receiving deposits after insolvency, repealing all laws in conflict herewith," is not unconstitutional with reference to private bankers for the reason that such provision is not embraced within the title of the act. The use of the words "bank officers" in the title is a sufficient indication of the legislative intent to embrace in its provisions not only officers of incorporated banks, but all persons officiating in a banking establishment or place doing a banking business: *State v. Arnold*, 140 Ind. 628.

Bonds.—The constitutional requirement that the subject of an act shall be expressed in its title is not contravened by a title, "An act to change the name of the Fidelity Loan and Trust Company of Baltimore City to the Fidelity and Deposit Company of Maryland, and to amend and define the powers of said company," where every provision in the act refers and relates to the powers and franchises to be exercised by the company, and among those powers is one authorizing it to be surety on the bonds of trustees: *Gans v. Carter*, 77 Md. 1, 10; *Herzberg v. Warfield*, 76 Md. 446, 451. "An act to enable counties, municipal corporations, the board of education of any city, and school districts to refund their indebtedness." is broad enough to cover an express provision in the body of the act for refunding "township" indebtedness, by the issuance of bonds, and unrestricted power to issue municipal bonds authorizes the issuance of negotiable bonds: *Rathbone v. Hopper*, 57 Kan. 240. So "An act to authorize turnpike, plankroad, and canal companies to issue bonds and secure the same by mortgage, and to abandon portions of their roads and lines for public use," is not unconstitutional for the subject matter is not disguised or concealed by the title; and the title is not misleading because it gives such notice of the subject of the act as is reasonably necessary to put one upon inquiry as to what the body of the act contains: *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50. But the title, "An act to provide for the registration of precinct or township and school district bonds," does not express the subject of an act which makes it the duty of the county commissioners to levy the necessary taxes to meet the liability incur-

red by such bonds. Such a law is, therefore, void: *Burlington etc. R. R. Co. v. Saunders County*, 9 Neb. 507.

Bridges and Ferries.—An act providing for the acquisition, by a committee, of a certain bridge and ferry on behalf of a city named may properly contain the details by which the general object is to be accomplished, without being open to the constitutional objection that it contains more than one subject. These are matters properly connected with the subject of the act. A provision in an act requiring a tax to be levied and collected by a certain county for the repair and maintenance of certain bridges and ferries is clearly germane to and properly connected with the subject of an act, which, in its title clearly states that one of the purposes of the act is to require the county court of such county "to assume the management, control, and supervision of such bridges and ferries": *Simon v. Northup*, 27 Or. 487. But so much of the Oregon act of February 21, 1895, on the subject of certain bridges and ferries within the city of Portland as requires Multnomah county to maintain a ferry at Sellwood is unconstitutional, because that ferry is neither mentioned in the title of the act, nor connected with any matter that is mentioned therein: *Simon v. Northup*, 27 Or. 487.

Chattel Mortgages.—A statute providing that no chattel mortgage executed by a married man or married woman on household goods shall be valid unless joined in by the husband or wife as the case may be, is not unconstitutional as embracing a matter not germane to the title, which is, "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel, and mechanics' tools." In such proceedings, the question will necessarily arise whether the mortgage sought to be foreclosed is a valid mortgage, or belongs to the class of mortgages intended to be comprehended within the provisions of the act and whatever goes to the solution of these questions cannot be said to be foreign to the subject expressed in the title: *Gaines v. Williams*, 146 Ill. 450, 455.

Conditional Sales.—An act concerning conditional sales of personal property is constitutional where the title is, "An act to regulate conditional rates and sales of personal property, and to provide for filing instruments pertaining to the same with certain officers, and making a violation thereof a misdemeanor": *Weil v. State*, 46 Ohio St. 450.

Corporations.—The title, "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges," sufficiently expresses the subject of an act requiring a fee to be charged and collected for filing certificates of incorporation, etc., and prohibiting corporations from having or exercising any corporate powers, or from doing any business in the state until their certificates of incorporation are filed: *Jones v. Aspen Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220. An act empowering the formation of "co-operative associations" is not open to the constitutional objection that its title does not express its subject, when its provisions are couched in language which shows that it was

designed mainly for the purpose of enabling men of small capital, or of no capital but their labor and skill in trades, to form corporations and thus give employment to such capital or labor and skill: *Finnegan v. Noerenberg*, 52 Minn. 239; 38 Am. St. Rep. 552. The subject of a bill is expressed in its title when the subject is to incorporate a railroad company, and the title is, "An act to incorporate the Belleville and Illinoistown railroad company," although the name of the company does not give a full description of the road authorized to be constructed: *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589. The objects of the Illinois "act to incorporate the Firemen's Benevolent Association, and for other purposes," approved June 21, 1852, are sufficiently expressed in its title: *Firemen's etc. Assn. v. Lounsbury*, 21 Ill. 511; 74 Am. Dec. 115. The title, "An act to incorporate the Mississippi, Terreaux-Boeufs and Lake Borgne Railroad Company, and to define its powers and authority," is broad enough to cover a provision in the charter of the company conferring upon it the right to build branch roads and to "expropriate" for the purpose. The constitution requires only that the title should announce the general object of the act: *Mississippi etc. R. R. Co. v. Wooten*, 36 La. Ann. 441. A section of an act for the incorporation of railroad companies, which section provides for an individual liability of the stockholders, is constitutional where its provisions contain matter properly connected with the title of the act: *Shipley v. Terre Haute*, 74 Ind. 297. The title, "An act to provide for the formation of certain corporations under general laws," is sufficiently expressive of the subject of the act, which embraces powers given to corporations thereunder, including the power to certain corporations to build connecting railroads and other means of transportation: *Ex parte Bacot*, 36 S. C. 125. The title, "An act to provide for the formation of corporations," clearly expresses the subject of an act requiring the filing of annual reports of the financial condition of corporations, and, in case of failure to do so, making the directors liable for debts of the corporation: *Tabor v. Commercial Nat. Bank*, 62 Fed. Rep. 383. An act whose title is, "An act to authorize and empower certain corporations incorporated under an act entitled, 'An act to provide for the incorporation and regulation of certain corporations,' approved, etc., to pay money or benefits to members in the event of their sickness, accident, disability, or death, or in the event of any or all such contingencies," and giving certain corporations the right to issue death benefit certificates to their members, has its purpose sufficiently expressed in its title, and is constitutional: *Commonwealth v. Keystone etc. Assn.*, 171 Pa. St. 465.

On the other hand, an act whose title is, "An act to incorporate the Manufacturers' Improvement Company," and which authorizes the company to clear out, improve, and erect dams in a creek and its tributaries in certain counties, which creek is already a public highway, and to maintain the stream in good condition for floating logs, timber, etc., and for which the company is author-

ized to charge tolls from persons floating lumber therein, does not have its purpose expressed in the title. The statute is unconstitutional because the title is misleading: *Rogers v. Manufacturers' Imp. Co.*, 109 Pa. St. 109. Compare subhead, "Railroads," *infra*, for further illustrations concerning the sufficiency of titles in acts concerning corporations.

Counties.—If an act contains subject matter creating an unorganized county into a municipal township of the county to which it is attached for judicial purposes, this is not so foreign to the other subject matter of the act, relating to county boundaries, as will justify a court in pronouncing the act unconstitutional where its title is, "An act to amend [certain enumerated sections] of the General Statutes of Kansas, and providing for the enforcement of the laws and the preservation of the peace in unorganized counties of the state of Kansas": *Philpin v. McCarty*, 24 Kan. 393. An act forming a county out of three organized townships, and then dividing the county into two townships, does not violate a constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title": *Attorney General v. Welmer*, 59 Mich. 580.

An act "to provide for the removal of the county seat," etc., sufficiently expresses the subject of an act which provides for the removal: *Hamilton v. Carroll*, 82 Md. 326. So, an act "to create a treasurer for Calvert County, and to provide for the collection of taxes therein," is consistent with a provision in the act authorizing the treasurer to appoint a deputy. The title sufficiently describes the subject matter of the act and the statute is constitutional: *County Commrs. v. Hellen*, 72 Md. 603. If the object of an act is to build a courthouse, the purpose is expressed in a title which reads, "An act to authorize the construction and maintenance of a courthouse in Campbell county." All the various sections of the act having a direct connection with the subject matter expressed in the title must be regarded as necessary to carry the legislative intent into execution: *McArthur v. Nelson*, 81 Ky. 67.

An act whose title is, "An act to establish a uniform system of county and township governments," and whose provisions concern the carrying on of such governments by the election of officers and the establishment of their compensation, has its subject matter sufficiently expressed in its title: *Longan v. County of Solano*, 65 Cal. 122. So an act entitled, "An act entitled an act to amend section 127 of an act entitled, 'An act concerning counties, county officers, and county government, and repealing laws on these subjects', and which provides that county officers shall keep their offices at the county seat open during business hours, that all books and papers required to be in their offices shall be open to examination, and that any person engaged in making abstracts shall have the right to inspect and make memoranda of the contents of such books and papers for the purpose of their business," sufficiently expresses the subject matter thereof in its

title: *Stocknan v. Brooks*, 17 Colo. 248. The title "An act to amend the county court laws as regards Taylor county, and to provide for the appointment of a county solicitor for said county, and for other purposes," is comprehensive enough to embrace all provisions of the act which are pertinent and appropriate to a scheme or system of county court law for Taylor county, and none of which are different from, or at variance with, anything expressed in the title: *Peed v. McCrary*, 94 Ga. 487. The title, "An act to authorize the board of county commissioners of Cherokee county to build a courthouse, and to build and pay for bridges in said county and to provide a fund therefor" sufficiently expresses the subject of the act which is the creation and use of a fund for public improvements in Cherokee county, consisting of a courthouse and bridges: *Board of Commrs. v. State*, 36 Kan. 337. An act "to add an additional article to the code of public local laws, to be entitled Garrett county," is not unconstitutional on the ground that its subject is not expressed in its title: *State v. Fox*, 51 Md. 412. Neither is the Kentucky act of January 30, 1878, respecting the compromise and settlement of the county of Carter with its creditors, unconstitutional on that ground: *Carter County v. Sinton*, 120 U. S. 517.

If the sections of Compiled Statutes, which are amended, treat of county finances, bonds, and warrants, they are germane to the object of an act, which is to authorize a county to fund its indebtedness already in existence. Hence, if the title is to amend such sections, naming them, the act is constitutional so far as its subject is expressed in its title: *Hotchkiss v. Marion*, 12 Mont. 218. If the subject of an act is to provide for the payment, by new counties, of their proportionate share of the indebtedness of the older counties from which they were created, and this is expressed, in so many words, by the title, the act is valid: *Mills County v. Brown County*, 87 Tex. 475. If the title of an act advises everyone interested in the doings of a board of supervisors that the powers of that board, with respect to borrowing money on the town's credit, for the purpose of building, repairing, or improving highways, may be increased or diminished, it is sufficient: *Dunton v. Hume*, 15 N. Y. App. Div. 122, 124.

But the subject matter of a statute requiring counties to give bounties to certain soldiers is not expressed by the title, "An act to legalize and make valid, certain county bonds, and to provide for the payment of the same," nor is it connected with the subject expressed. The act is, therefore, unconstitutional: *Board of Commrs. v. Baker*, 80 Ind. 374. So an act fixing the salaries of justices of the peace in incorporated cities having more than five thousand inhabitants is not repealed by an act entitled, "An act to provide for the economical management of county affairs," and providing that the salary allowed by law to an officer shall not exceed the amount of the legal fees collected on account of such office. The subject of the former act is not expressed in the title of the latter act, and the latter act would be unconstitutional so

far as effecting that object is concerned: *Anderson v. Whatcom County*, 15 Wash. 47. Same principle, see *Shepherd v. Helmers*, 23 Kan. 504. The title, "An act authorizing the application of the railroad fund of Montgomery county to other purposes after the debt is paid," does not justify a provision in the body of the act that an annual appropriation and diversion of the surplus of the county railroad fund may be made. The body of such a statute is broader than its title, and the act is unconstitutional, because the provision for an annual appropriation and diversion of surplus is not warranted by, nor germane to, the purpose of the act as expressed in its caption, which clearly contemplates only the disposition of such surplus as necessarily remains after the railroad debt is finally paid: *Kennedy v. Montgomery County*, 98 Tenn. 165, 180. If the main provisions of an act, relative to counties, are not within the purview of its title, the statute is unconstitutional, at least so far as its purpose is not expressed: *Davies v. Board of Supervisors*, 89 Mich. 295. If such defect renders inoperative the other provisions of the statute, the entire act is void: *State v. County Commrs.*, 47 Neb. 428.

Courts.—The caption of an act creating a judicial district is not insufficient because it omits to state the different counties constituting the newly created district, or that one of the counties composing such district was transferred from some adjoining district: *Brown v. State*, 32 Tex. Crim. Rep. 119. If the object of an act is to provide for the holding of a court within certain defined territory, the fact that this territory consists of two counties does not make the title double, within the meaning of a constitution prohibiting double titles: *Toll v. Jerome*, 101 Mich. 468. If the object of an act, respecting courts, is expressed in its title, the constitution is satisfied: *Loomis v. Runge*, 66 Fed. Rep. 856.

An act whose title is, "An act to increase the jurisdiction of justices of the peace," and which gives courts, for the trial of small causes, jurisdiction to the amount of two hundred dollars, has its subject sufficiently expressed in the title: *Colwell v. Chamberlin*, 43 N. J. L. 387. The New Jersey act establishing district courts, and granting to those courts jurisdiction exclusive of all other courts whatever, in all causes arising under the act, was, so far as concerned the expression of its subject in the title, held constitutional in *Payne v. Mahon*, 44 N. J. L. 213. Contra *Payne v. Mahon*, 41 N. J. L. 292. An act to give concurrent jurisdiction to circuit courts and justices of the peace in all cases of misdemeanors has but one object, and the title of the act is sufficient where such object is clearly expressed therein: *State v. Chambers*, 70 Mo. 625.

A statute providing for the trial of offenses in certain cases has only one object expressed in its title and is constitutional: *State v. Carter*, 33 La. Ann. 1214; *State v. White*, 33 La. Ann. 1218. If the sole subject of an act is juries, a title thereto providing for the qualifications and for the selection of jurors throughout the state is sufficient: *State v. Henderson*, 32 La. Ann. 779. If the one object of an act is to provide for the trial of offenses, in accordance with a con-

stitutional provision giving the legislature power to provide therefor, with respect to the number of jurors, in all cases where the penalty is not necessarily imprisonment at hard labor or death, the title, "An act to provide for the trial of offenses where the penalty is not necessarily imprisonment at hard labor or death," is sufficient where the act, in relation to such offenses confines itself exclusively to the manner of their trial and the duties of the several officers mentioned in the act are directed solely to this one object: *State v. Wright*, 45 La. Ann. 57; *State v. Judges*, 32 La. Ann. 774. A title relative to juries covers the scope and meaning of a proviso in an act, which proviso expressly refers to the manner of summoning a jury in a special case excepted from the general provision of the act. The proviso has a direct relation to the object expressed in the title, is germane to it, and the title is, therefore, sufficient: *Soniat v. Supple*, 48 La. Ann. 296.

If a title, however, concerns challenges of jurors at regular jury terms, or juries of twelve, and the act itself disclaims any application to the trial of cases at any other term, but in the face of this disclaimer contains a provision on the subject of peremptory challenges in that very class of cases, which provision differs materially from another statute regulating criminal trials at other terms than regular jury terms, the act is unconstitutional because the object of the statute is not expressed in its title: *State v. Everage*, 33 La. Ann. 120. The New Jersey act of March 17, 1882, concerning courts for the trial of small causes, is unconstitutional with respect to appeals in bastardy and desertion cases, because, to that extent, the object of the act is not expressed in its title: *Evernham v. Hulit*, 45 N. J. L. 53. The same statute, an act entitled "A further supplement to an act entitled 'An act constituting courts for the trial of small causes,'" the provisions of which related to criminal procedure, was held unconstitutional in *Lane v. State*, 49 N. J. L. 673, as the title was misleading, and the object of the law was not expressed in its title. The object of a law providing that the unorganized counties of Clark and Meade shall be attached to the county of Comanche for judicial purposes is not expressed by a title, "An act to regulate the terms of court in the sixteenth judicial district, and repealing all acts in conflict herewith." Such a law is void: *In re Wood*, 34 Kan. 645. If the object of an act is to provide for the transfer of cases from and to a certain superior court, that object is not expressed by a title, "An act relative to filling vacancies" in the court named: *Callaghan v. Chipman*, 59 Mich. 610.

Crimes.—The title, "Crimes and criminal procedure," clearly indicates what a law contains, and is sufficient where the body of the act contains no incongruous matter, although the definition of crimes and the procedure against persons accused of committing them are embraced in the same act: *State v. Brassfield*, 81 Mo. 151; 51 Am. Rep. 234. The title, "An act relating to crimes and offenses" indicates what an act contains: *State v. Dubois*, 39 La. Ann. 676; *State v. Breeden*, 47 La. Ann. 374; *State v. Taylor*, 34 La. Ann. 978. If the title of an act is, "To create a new convict system for the state

of Alabama, and to provide for the government, discipline, and maintenance of all convicts in the state of Alabama," and the act provides for the payment of the costs of conviction in certain cases out of the fund arising from the labor of convicts, this is cognate to the purposes expressed in the title, which is sufficient: *White v. Burgin*, 113 Ala. 170. If the subject of a section of Revised Statutes is the "sworn statement of the accused," and the subject of an amendatory act thereto is also "the sworn statement of the accused," and such amendatory act, by its title, not only asserts that it is designed to amend a section of the Revised Statutes, but accurately, and with ample fullness, states what the subject of the section to be amended is, which subject is fully expressive also of the matter to be dealt with by the amendatory act, the law is not unconstitutional because of any failure of its title to express its subject: *Lester v. State*, 37 Fla. 382.

If a statute authorizes the party losing money by playing at cards, or other games, to recover back the money or thing lost, and, on default of bringing suit for such recovery, within a time limited by the statute, giving a right of action to any person to sue for and recover treble the value of the money, goods, chattels, or other things lost at gaming, by special action on the case against the winner, one-half to the use of the county and the other to the person suing, this purpose is sufficiently expressed by a title, "An act to revise the law in relation to criminal jurisprudence": *Larned v. Tiernan*, 110 Ill. 173. An act whose title is, "An act to provide for a metropolitan police in all cities of twenty-nine thousand or more inhabitants," and whose provisions make it a criminal offense to interfere with or interrupt a member of the police force therein provided for when making an arrest, has its purpose sufficiently expressed in the title: *Indianapolis v. Huegele*, 115 Ind. 581. If the title of a statute is "To further define and punish embezzlement," and section 1 of the act defines embezzlement, while section 2 fixes the punishment for a violation of section 1, the act is complete in itself, and, if it does not conflict with other existing statutes concerning embezzlement and its punishment, it does not amend such statutes, and cannot be held unconstitutional because of a failure of the title to express the subject of the act: *State v. Trolson*, 21 Nev. 419, 429. In an act to punish cheats, frauds, et cetera, naturally belongs a provision as to what shall be a sufficient statement of the offense in the indictment. Hence, if this one general subject is also clearly expressed in the title, "An act to punish cheats, frauds," et cetera, the title is sufficient, and the law not obnoxious to any constitutional prohibition by reason of such provision: *State v. Morgan*, 112 Mo. 202. An act whose title is, "To prevent the sale of cotton between sunset and sunrise," but which adds, in the body of the law, the words, "or receive on deposit," has its subject sufficiently expressed in the title: *Truss v. State*, 13 Lea, 311. An act "to add a new section" to criminal laws is sufficient where the object of the statute is to prevent the dredging, taking, and carrying away of sand and gravel from the

bed of a river named, and a punishment therefor is prescribed: *State v. Norris*, 70 Md. 91.

On the other hand, a title, "To regulate the management of state and county convicts," does not express the subject of the provisions of a statute relative to the payment by the state of certain costs incurred in the prosecution, trial, and conviction of convicts. Such provisions are, therefore, void, because they are not expressed in the title: *White v. Burgin*, 113 Ala. 170. So with that part of a statute making it criminal to remove mortgaged property out of the county within which it was situated at the time of the execution of the mortgage, where the title of the act is, "An act to prevent the fraudulent transfer of personal property": *Ex parte Thomason*, 16 Neb. 238. And the same is true of a penal provision in a revenue statute making it a crime for the state treasurer to "loan out, or in any manner use for private purposes," the public funds in his hands, under a title providing only "for the assessment and collection of revenue": *In re Breene*, 14 Colo. 401. If the purpose of an act is to take away from the circuit and criminal courts original jurisdiction of misdemeanors and confer it upon justices of the peace, exclusively, thus repealing, by implication, all acts in force which confer such jurisdiction upon said justices' courts, but no mention or reference is made, either in the body of the act, or in its caption, of the acts conferring the jurisdiction upon the courts, the act is manifestly inoperative and void: *McGhee v. State*, 2 Lea, 622. An act "to amend an act for the trial of misdemeanors," is void, so far as it attempts to provide for the trial of felonies, as that subject is not comprehended within the title: *Harper v. State*, 109 Ala. 28. A statute to punish those who are parties to or engage in "any other fight in the nature of a prize-fight," may not be open to the precise objection that its title, "An act to prohibit, discourage, and punish prize-fighting within the state of Michigan," is not broad enough to include this provision; but the statute is clearly inoperative, where the elements constituting such "other fight," et cetera, are not defined, either in the body of the act, or in its title: *People v. Taylor*, 96 Mich. 576. That part of a statute which undertakes to make it an offense to disturb the peace of any "person or neighborhood" is unconstitutional, if the title reads: "An act to change the penalty for disturbances of the peace," and the original act did not contain the words "person or neighborhood," because that matter is not expressed in the title: *State v. Persinger*, 76 Mo. 346. An act "to provide for the punishment of crimes in certain cases," and which makes it a felony to take indecent liberties with male children, does not have its object expressed in the title, and is unconstitutional. The title gives no hint as to the character of the act to be punished: *In re Snyder*, 108 Mich. 48.

Damages.—The title, "An act concerning damages, and to repeal an act concerning damages," is sufficient where the provisions of the act, though they relate to injuries resulting in death, are germane to the title and directly connected with the general subject of damages: *Mollie Gibson etc. Milling Co. v. Sharp*, 23 Colo. 259. The

Michigan act of 1887, providing for the recovery of damages for injuries sustained by reason of defective highways, et cetera, is not unconstitutional on the ground that its subject is not expressed in its title: *Tice v. Bay City*, 78 Mich. 209. An amendatory statute may have different objects and purposes from those of the original, and still be germane thereto, if upon the same subject. This applies to an amendment of a code section upon the subject of giving a right to recover damages for homicide: *Clay v. Central R. R. Co.*, 84 Ga. 345.

If the subject expressed in the title of an act is the provision of "a means for the collection of claims for cattle and other stock destroyed by railroad," but the body of the law declares or creates an absolute liability which did not exist prior to its passage, the new liability is not within the subject expressed in the title, and, to that extent, the statute is void: *Savannah etc. Ry. Co. v. Geiger*, 21 Fla. 669; 58 Am. Rep. 697.

Deeds.—If the title of an act shows its purpose to be a regulation of the "acknowledgment of deeds and other conveyances of land," while the subject of one section of the body of the statute is a declaration of the effect of omitting to record a conveyance, it is clear that the one subject does not embrace or have any proper connection with the other, and such section is void: *Carr v. Thomas*, 18 Fla. 736, 747.

Descent, Disposition, and Distribution of Property.—A statute providing for the descent of real property, the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, under a title, "to amend" certain sections of the Compiled Statutes, and "to repeal" the original sections, and "to repeal" other sections named, is void, not only because it has more than one subject, but also for the reason that its object is not expressed in its title: *Trumble v. Trumble*, 37 Neb. 340. The same is true of an act whose title is, "To release the interest of the people of the state of New York in certain real estate" to the heirs at law of George Spicer, "and for other purposes," and which act purports, in its first section, to release to the persons named in the title the interest which the state acquired by escheat in certain described real estate, and, in the second section, assumes to release to said persons all the interest which the state has in the personal property, of which a woman, between whom and Spicer there existed an antenuptial agreement with reference to property rights, died possessed of, or was entitled to: *Johnston v. Spicer*, 107 N. Y. 185, 201, 202. No disposition of property held under a conditional purchase is a punishable offense under a statute whose title is "To make penal the selling or encumbering personal property held under a conditional purchase, and to provide a penalty for the same," except by selling or encumbering the property, as such a title does not embrace any other mode of disposition: *Dempsey v. State*, 94 Ga. 736. If the title of a statute is, "To secure creditors a just division of the estates of

debtors, who convey to assignees for the benefit of creditors," a provision, in the body of the law, concerning the dissolution of attachments is a matter properly connected with the subject of disposing of an insolvent debtor's property; and the subject must be regarded as sufficiently expressed in the title, although, in the opinion of the court, the disposition of the property provided for, is not just: *Mayer v. Cahalin*, 5 Saw. 355.

Docks and Wharves.—The power to charge and collect wharfage is reasonably indicated by a title authorizing a town named "to raise money for the purpose of constructing a town dock," and the title is sufficient: *Pelham v. Woolsey*, 16 Fed. Rep. 418. So an act whose title authorizes "the construction of a dock or wharf," on a river named, and which act authorizes persons named to "erect and maintain" a dock or wharf in front of their lands on the river mentioned, has its object sufficiently expressed in its title: *Roberts v. Brooks*, 78 Fed. Rep. 411.

Drains and Drainage.—A statute whose title is, "To provide for establishing, constructing, and maintaining drains in this state," and which act provides for the appointment of a drain commission, vesting in it the powers of the act, and making provision for levying special assessments to pay for the cost of constructing drains, for the issuance of county bonds to meet such expenses, and for the creation of a sinking fund to pay such bonds, is not unconstitutional on the ground that its subject is not expressed in its title: *Martin v. Tyler*, 4 N. Dak. 278. "An act concerning drainage" is a sufficient title to include legislation directing the mode of making and collecting assessments upon lands benefited by the work, including the collection of reasonable attorneys' fees: *Wishmier v. State*, 97 Ind. 160; *Ritchie v. People*, 155 Ill. 98, 120; 46 Am. St. Rep. 315, 332. Such a title also properly embraces legislation authorizing a board of drainage commissioners: *Ross v. Davis*, 97 Ind. 79. But in Louisiana it has been held that the title, "An act to provide for the drainage of New Orleans," does not justify the creation of a new drainage district, and still less the institution of "extraordinary proceedings" to coerce the payment of drainage taxes, as it does not indicate such purposes: *Succession of Irwin*, 33 La. Ann. 63. Compare *Jefferson etc. R. R. Co. v. New Orleans*, 31 La. Ann. 478, as to the validity of a title concerning an extension of the limits of a drainage district, which applied the same principles, in such a case, as govern a change in the boundaries of a parish. See subhead, "Counties," *supra*.

Elections.—If the main purpose of an act is to change the composition of a board of supervisors in a certain county, to diminish the number of the members of the board as provided by the general township organization law, and to change the mode of their election, from towns singly to groups of towns, this object is not expressed by a title, "An act to change the time of electing certain officers in a county therein named," nor is it in any way germane to the purpose expressed in the title: *Leach v. People*, 122 Ill. 420, 426.

But a title, "To protect primary elections and to punish frauds committed thereat," embraces a section providing a penalty for voting more than once at a primary election: *McCook v. State*, 91 Ga. 740. The subject matter of a statute providing for the election of superior court judges by newly established districts is sufficiently embraced in a title reciting that it is "An act in relation to superior courts and the election of superior court judges": *State v. Rusk*, 15 Wash. 403. So if the aim of a statute is to abolish peculiarities touching the selection and duties of a director of a board of chosen freeholders, which exist in a county named alone, and to subject the selection and duties of the director in that county to the general law governing the rest of the state, this purpose is sufficiently expressed by the title, "An act concerning the constitution of the boards of chosen freeholders of this state, and to make uniform the selection and duties of directors of such boards": *Bumsted v. Govern*, 47 N. J. L. 368. Under the title, "An act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other acts and parts of acts in conflict herewith," it is competent to provide, in the body of the law, for filling vacancies occasioned by the death or disability of one of the electors first chosen: *McPherson v. Blacker*, 92 Mich. 377, 391; 31 Am. St. Rep. 587, 597.

"An act to provide for the registration of all voters in cities having a population of more than one hundred thousand inhabitants, and to govern elections in such cities, and to create the office of recorder of voters," is not unconstitutional on the ground that its main object or subject matter is not expressed in its title. The registration of voters is not one subject and the governing of elections another and distinct subject. The aim of the act is to provide for the registration of voters as "the first and initial step taken in order to have an election, and, in this view of it, elections in such cities may be said to 'fairly relate to the registration of voters, and have not only a material, but necessary, connection with it'": *Ewing v. Hoblitzelle*, 85 Mo. 64, 72. "An act to provide for and to regulate the registration of voters in cities of the first and second class, and to repeal all prior acts in relation thereto," is a title broad enough to authorize a provision in the statute prescribing a criminal punishment for improperly registering the names of voters: *State v. Bush*, 45 Kan. 138. The system of registration of voters also includes, as an incident, the method of obtaining naturalization certificates. Hence, a provision in a law that copies of such certificates shall be furnished by the clerk free of charge is fairly within the title of an act, "To provide a system of registration": *Naturalization of Osthoff*, 48 La. Ann. 1094.

If the title of an act, while setting out the subject matter of the law clearly and fully, also purports to amend, partly, some other law, which, though not mentioned, would be repealed, by implication, to the extent specified, this part of the title will be rejected as surplusage. This principle was applied to a law providing for

a local election in Butler county, Alabama, to adopt or reject a prohibitory liquor law: *Gandy v. State*, 86 Ala. 20.

Eminent Domain.—"An act to amend an act to regulate the condemnation of property in cities and towns, for the purpose of opening, widening, or changing public streets, or avenues, or alleys, or for water mains or sewers," does not authorize the condemnation of grounds for "reservoirs or standpipes," as this subject is not expressed in the title, and is not covered by the term "water mains": *Adams v. San Angelo etc. Co.*, 86 Tex. 485.

Fish and Game.—If a law respecting the protection of fish expresses its general subject in the title with reasonable clearness, the constitutional requirement relative to the expressing of the main object or subject matter of a law in its title is satisfied: *State v. Stunkle*, 41 Kan. 456; *People v. Miller*, 88 Mich. 383; *In re Yell*, 107 Mich. 228. Otherwise, the law is void and of no effect: *West Point etc. Co. v. State*, 49 Neb. 223. It is unnecessary to indicate in the title any punishment for a violation of the law: *People v. Miller*, 88 Mich. 383. The same is true of laws for the protection of game. "An act to provide for the protection of game in the state of Michigan," does not apply to quail killed in another state and taken into Michigan after they are killed: *People v. O'Neil*, 71 Mich. 325. If the title of an original act is, "An act for the preservation, propagation, and protection of the game and fish of the state," and the title of an act amendatory thereto is, "An act to amend an act for the preservation, propagation, and protection of game and fish of the state," it is difficult to conceive of a title that would more clearly express the subject of an act relative to this matter, especially where every provision in both the original and amendatory acts is entirely germane to the subject legislated upon: *State v. Rodman*, 58 Minn. 393.

Fraudulent Conveyances.—If the object of an act is to prohibit the fraudulent sale, transfer, secretion, encumbrance, or disposal of property with the intent to defraud creditors, that purpose or aim is sufficiently expressed by the title, "An act to prohibit the fraudulent transfer of property, and to declare the same a crime, and to prescribe the punishment thereof": *Herold v. State*, 21 Neb. 50.

Gaming or Gambling.—The title of an act, "To prevent and punish gambling" is broad enough to cover provisions of the act giving a remedy by civil action for double the value of the money or thing lost, and there is no legal objection to the mingling of civil and criminal provisions in the same act: *O'Keefe v. Weber*, 14 Or. 55. So a provision in an act giving any person losing money at gaming a cause of action to recover the same from the dealer or winner is fairly embraced within a title, "To prevent and punish gaming"; *Maling v. Crummev*, 5 Wash. 222; *Perry v. Gross*, 25 Neb. 826.

The title, "An act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of games of keno, faro, three-card monte, and mustang, etc.." contains but one subject, that of gaming-houses, and embraces other similar or kindred games specified in the body of the act, because of the

use of the term, "etc." The subject or main purpose of the law is expressed in the title: *Garvin v. State*, 13 Lea, 162. If a section of the Revised Statutes makes gambling a misdemeanor, and an amendatory act makes it a felony and fixes the penalty accordingly, the subject of the new act is expressed with sufficient clearness by the title, "An act to amend [said section] relating to offenses against public morals and decency, or the public police, and miscellaneous offenses": *State v. Laughlin*, 75 Mo. 358. The subject of a statute which prohibits and denounces as criminal the sale of any pool or ticket, or the making or taking of any wager, or the entering into any transaction whereby money or other thing of value may be won or lost upon any horse race, prize-fight, drill, baseball game, or any contest of any kind, not occurring within the state, is sufficiently expressed by the title, "For the better suppression of gambling": *State v. Stripling*, 113 Ala. 120.

Growing Hedges.—An act "To encourage the growing of hedges" has its subject expressed in its title: *Board of Commissioners v. Winkley*, 29 Kan. 36.

Horseracing and Poolselling.—If the title of an act declares it to be an act regulating horseracing at certain seasons, prescribing a penalty for a violation of the provisions of the act, prescribing rules of procedure, giving certain civil remedies, authorizing the institution of suits, and declaring emergencies, a section of such act making it unlawful to hold, or advertise for, race meetings oftener than three times in a year, fixing the maximum length of race meetings, naming periods when they shall not be held, and providing a penalty for violating the act, is within the title: *State v. Roby*, 142 Ind. 168; 51 Am. St. Rep. 174. If the subject of an act is to prohibit bookmaking and poolselling, and that is expressed in the title in so many words, nothing more could be required: *State v. Burgoerfer*, 107 Mo. 1. A statute entitled "An act to prevent poolselling, and so forth, upon the result of any trials of speed of any animals or beasts taking place without the limits of the commonwealth," and which makes it unlawful for any person, association, or corporation, by any means or device, to make any bet or wager, or to receive, record, register, or forward, purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trials of speed, power of endurance, or skill of animals which is to take place beyond the commonwealth, conflicts with that provision of the state constitution declaring that no law shall embrace more than one object, which shall be expressed in its title, because it prohibits acts which are not included in the term "poolselling": *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 795.

Hotel, Inn, and Boarding-House Keepers.—An act "to protect hotel and innkeepers" expresses its purpose in the title: *State v. Kingsley*, 108 Mo. 135. An act "to protect hotel, inn, and boarding-house keepers" embraces but one subject, namely, the protection of the classes mentioned, and has that subject sufficiently expressed in its title: *State v. Yardley*, 95 Tenn. 546. If the subject of an act is the rights, duties, and liabilities of innkeepers, common carriers, and

proprietors of places of public amusement, et cetera, that object or purpose is expressed by the title, "An act to define the rights, duties, and liabilities of innkeepers, common carriers, and proprietors of places of public amusement," although the body of the act contains a provision that no turbulent or riotous conduct shall be allowed in such places and providing for the punishment of the offenders, as this legislation is not on a different subject: *State v. Lasater*, 9 Baxt. 584.

Insane.—A law providing for the construction of an insane asylum, that the money appropriated for that purpose shall be taken from the state school fund, and that in its place there shall be deposited state bonds, bearing interest, et cetera, together with a provision for the levy and collection of a tax to meet the payment of the bonds, has its subject, the care of the insane, expressed in its title, an "act to provide for the taking care of the insane of Nevada": *Klein v. Kinkead*, 16 Nev. 194.

Insolvency.—If the sole object of a statute is to provide for the payment of wages and salaries in cases where an assignment has been made for the benefit of creditors, that object is expressed in the title, "An act to provide for the payments of the wages and salaries due employes of insolvent employers"; and, if all the provisions of the insolvent law refer to natural persons only, the fact that corporations are mentioned in the body of the statute, and provision therein made for the payment of such wages and salaries in the event of those bodies being adjudicated insolvent, does not lead to a different conclusion, for it will be presumed that the legislature did not mean to bring corporations within the operation of the insolvent laws without making provision of some kind as to the mode of procedure in such cases: *Ellicott Machine Co. v. Speed*, 72 Md. 22, 24.

Insurance.—An act "to authorize the organization of mutual insurance companies" has but a single subject of legislation, and that is expressed in the title: *State v. Moore*, 48 Neb. 870. "To provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," is a title sufficient to embrace, without special mention in the body of the law, provisions for winding them up if they neglect to perform their duties or to exercise powers. Such a title is also broad enough, in the object expressed, to embrace examinations by the commissioner of insurance, the appointment of a receiver, and the assessment of policy holders to pay liabilities and expenses: *Wardle v. Townsend*, 75 Mich. 385, 390. So the provisions of an act "relating to life and casualty insurance on the assessment plan," which exempt from garnishment, et cetera, money or benefits due from companies doing such business, are germane to the subject expressed in the title, and are properly included in the law: *Burton v. Snyder*, 22 Colo. 173.

Intoxicating Liquors.—Under the title, "An act amendatory of, and supplemental to [a chapter of the Revised Statutes specified], entitled 'Liquors,'" additional matter germane to the purpose of the chapter mentioned may be added, without vitiating the title: *In re White*, 33 Neb. 812. The provisions of a liquor law, that if the house where spirituous liquors are sold is kept in a disorderly man-

ner, it shall be deemed a nuisance and work a forfeiture of license, et cetera, are within the title, "An act to regulate and license the sale of spirituous, vinous, and malt and other intoxicating liquors," et cetera, although such title does not use the term "nuisance": *Fletcher v. State*, 54 Ind. 462; *O'Kane v. State*, 69 Ind. 183. The title, "An act to amend" a certain statute "relating to the practice of pharmacy," which statute authorized pharmacies to sell intoxicating liquors, is not unconstitutional on the ground that the subject matter of the act is not expressed in its title: *State v. Aulman*, 76 Iowa, 624.

A statute, "to regulate, restrain, or prohibit the sale of intoxicating liquors," has but one subject, which is expressed in its title: *State v. Spokane Falls*, 2 Wash. 40. The title of an act, "to regulate the sale of intoxicating liquors, in the original packages or otherwise, is not insufficient because of a provision in the act setting apart a portion of the dramshop license fund for road purposes: *Lynch v. Murphy*, 119 Mo. 163. The title, "An act to regulate the sale of intoxicating liquors in less quantities than one quart," if amended by striking out the phrase "in less quantities," et cetera, is still comprehensive enough to include the provisions contained in the act relative to a license tax, that being one of the means usually employed for the purpose of regulating the sale of intoxicating liquors: *State v. Doherty*, 2 Idaho, 1105. So the title, "An act to regulate the license and sale" of intoxicating liquors is broad enough to cover a provision in the act requiring the licensee and his bondsmen to pay all damages which individuals may sustain in consequence of intoxicating liquors furnished by him to another: *Poffenbarger v. Smith*, 27 Neb. 788. A section of an act which prohibits the giving away of intoxicating liquor to a minor is properly connected with the subject embraced by the title, "An act to regulate and license the sale of spirituous, etc., liquors": *State v. Adamson*, 14 Ind. 296. The same is true of a provision in a liquor law which requires the applicant for such license to give a bond to the state, conditioned, among other things, that he will pay all fines and costs that may be assessed against him for any violations of the provisions of the act: *Kane v. State*, 78 Ind. 103. A statute entitled, "An act to restrict the power of counties, cities, towns, and villages in licensing dramshops, for providing a license to retail malt liquors separately, and for punishing persons holding such separate licenses for unlawful sale and gifts," is a valid and constitutional law where the subject matter of each of its three sections is embraced in its title: *Timm v. Harrison*, 109 Ill. 593. While the object of a statute may be to regulate the sale of liquors, to collect revenue, and divers other purposes and objects, still it is constitutional, unless there is more than one subject in the act: *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182.

The Iowa statute of 1855, entitled, "An act for the suppression of intemperance," does not embrace more than one subject, which is expressed in its title: *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; and the Maryland act of 1856, requiring licenses of vendors of lager beer manufactured by themselves, has its subject described in the title, "An act to raise additional revenue to pay the debts

of the state, by increasing the rates of license to ordinary keepers and traders": *Keller v. State*, 11 Md. 525; 69 Am. Dec. 226. The Georgia prohibitory act of August 11, 1891, is also valid so far as the sufficiency of the title is concerned: *Butler v. State*, 89 Ga. 821.

The title, "An act to prohibit the sale of intoxicating liquors," is not insufficient because of the fact that the body of the statute makes it unlawful to "sell" or "give" the same away: *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Cearfoss v. State*, 42 Md. 403; *Carson v. State*, 69 Ala. 235; or because of a provision in the act against the sale of Plantation Bitters, or other intoxicating bitters sold under the name of patent medicines: *Howell v. State*, 71 Ga. 224; 51 Am. Rep. 259. So the title, "An act to prohibit the sale of intoxicating liquors to minors," et cetera, is not insufficient because of the fact that the body of the statute makes it unlawful "to sell, dispose of, barter, or give" such liquors to minors: *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522. The title "An act to prohibit the sale, giving away, or otherwise disposing of spirituous, vinous, or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base," in a county named, is not insufficient by reason of the fact that the body of the law provides for an election to ascertain the sense of the people on the question of prohibition, and specifies the time when the prohibitory clauses shall go into effect, if the popular vote is in favor of prohibition: *Ramagnano v. Crook*, 85 Ala. 226. A local option law which declares that it shall not apply to any city, town, or village in which the sale of liquor is now, or shall thereafter be, prohibited by legislative enactment, has but one subject, local option, which is expressed by the title, "An act to provide a local option law for the incorporated cities, towns, and villages of this state": *State v. Chester*, 18 S. C. 464. See, also, *Slymer v. State*, 62 Md. 237. So a prohibitory liquor law, declaring that all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage are common nuisances, and that the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance and shall be punished by a certain fine and imprisonment, is not unconstitutional because the subject thereof is not expressed in its title, "An act relating to intoxicating liquors," et cetera: *State v. Campbell*, 50 Kan. 433, 435. See, also, *Durein v. Pontious*, 34 Kan. 353; *Brann v. Hart*, 97 Ky. 735. It is not necessary, in a local prohibition law, to express in its title the jurisdiction conferred by the act upon justices of the peace. That is a matter naturally embraced in the subject matter suggested by the title: *McTigue v. Commonwealth*, 99 Ky. 66.

But an act does not have its subject expressed in its title where the title prohibits the issuing of licenses within a certain prescribed territory, and one section of the act makes it an indictable offense for any person to sell intoxicating liquors within the prescribed territory, as such a title is palpably misleading: *Hatfield v. Commonwealth*, 120 Pa. St. 395, 403. So a statute prohibiting the sale of liquors to drunken husbands does not express its object by the title, "An act to prevent the sale, giving, or delivery of liquors to minors": *Hyman v. State*, 87 Tenn. 109. If a title to an act purports

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to constitute a town and vicinity a separate school district, and the act prohibits the sale of spirituous liquors within the district, under the penalty of a fine payable, on conviction, to the school trustees, the subject of the act is not expressed in the title, as such a provision in the act is not germane to the subject stated in the title of the statute: *Montgomery v. State*, 88 Ala. 141. So if the title is, "An act to establish a separate school district," and "for the appointment of a board of trustees" therefor, "with certain powers and privileges," so much of the law as provides that no license for the sale of spirituous liquors within the district shall be granted to any person without the recommendation of the board of trustees as to his moral fitness is inoperative and void, because its subject is not expressed in the title: *Glenn v. Lynn*, 89 Ala. 608. If there is found in a statute, the title of which purports to authorize police juries to adopt Sunday laws, other distinct and separate provisions of which no hint is expressed in the title, such as one defining a new penal statute, and the other providing for a new mode of prosecuting violators of certain police jury ordinances, such provisions are void because the title does not express them: *State v. Baum*, 33 La. Ann. 981, 984. If the title of an act relates to the regulation of the sale of intoxicating liquors, and does not disclose other purposes indicated in the body of the act, the title is insufficient as to matters it does not disclose, and such matters are of no force or effect: *Whitman v. State*, 80 Md. 410; *In re Hauck*, 70 Mich. 396; *People v. Beadle*, 60 Mich. 22. Thus, an act "to regulate the sale of spirituous or intoxicating liquors of any kind" in a county named is invalid so far as it absolutely prohibits the sale of such liquors, because it contains matter not expressed in the title: *Crabb v. State*, 88 Ga. 584; *Knight v. State*, 88 Ga. 589; *Miller v. Jones*, 80 Ala. 89. A provision in a law, "to regulate the sale of intoxicating liquors," et cetera, providing for the punishment of persons found intoxicated, is not expressed in the title, nor is it properly connected with the subject therein expressed: *State v. Young*, 47 Ind. 150. If the object of a statute is to prevent the sale of intoxicating liquors within "a distance of a mile from Wesley lake bridge, at Ocean Grove and Asbury Park," that object is not expressed by the title "An act to prevent the sale of intoxicating liquors within one mile of Ocean Grove and Asbury Park": *Ryno v. State*, 58 N. J. L. 238. So the title, "An act to provide for licensing boats, hacks, and other vehicles by incorporated campmeeting associations or seaside resorts, and for the better government of the same," does not authorize provisions in the act as to licensing, regulating, or prohibiting the manufacture or sale of liquor: *Grover v. Trustees et c. Assn.*, 45 N. J. L. 399. And the title, "To prohibit the issuing of licenses to sell" liquors in certain specified boroughs, is not broad enough to embrace a provision in the act providing a punishment for the sale of liquor in said boroughs: *Commonwealth v. Frantz*, 135 Pa. St. 389. Wherever the body of an act concerning the regulation of the sale, or licensing or prohibiting the sale, of intoxicating liquors, contains matter not in the title, or not pertinent or germane thereto, or connected therewith, the title is to that extent insufficient, and the law as to the matter not thus covered by the

title is inoperative and void: *Sasser v. State*, 99 Ga. 54; *State v. Barrett*, 27 Kan. 213; *State v. Looker*, 54 Kan. 227, 229. A statute which enacts that it shall be unlawful for any person to sell "intoxicating" liquors contains matter not expressed in the title, "An act to prohibit the sale of spirituous liquors," because some intoxicating liquors are not comprehended in the descriptive term, "spirituous liquors": *McDuffie v. State*, 87 Ga. 687.

Irrigation.—An act respecting irrigation, or to provide for water rights and irrigation, is valid where the provisions of the statute are germane to the subject expressed in the title, for in such a case the subject is expressed in the title: *Golden Canal Co. v. Bright*, 8 Colo. 144; *Faxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884; 50 Am. St. Rep. 585; *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513; 55 Am. St. Rep. 149.

Municipal Corporations.—The title of an act relating to municipal corporations is sufficient, where that subject is indicated in the title, and the provisions of the act are germane to the general subject expressed in the title; and this applies to amendatory and supplemental acts. If the general purpose of the act is declared in its title, the title is not insufficient because the means and instrumentalities required to accomplish the purpose of the act are expressed in the act: *Kelly v. Minneapolis*, 57 Minn. 294; 47 Am. St. Rep. 605; *Ritchie v. People*, 155 Ill. 98, 120; 46 Am. St. Rep. 315, 332; *Bagwell v. Lawrenceville*, 94 Ga. 654; *State v. Browne*, 56 Minn. 269; *David v. Portland Water Committee*, 14 Or. 98; *McGurn v. Board of Education*, 133 Ill. 122; *Cravener v. Board of Education*, 133 Ill. 145; *In re Airy Street*, 113 Pa. St. 281; *Commonwealth v. Wyman*, 137 Pa. St. 508; *Commonwealth v. Morgan*, 178 Pa. St. 198; *Gasch v. Davies*, 1 Wash. 290; *Yesler v. Seattle*, 1 Wash. 308; *Seymour v. Tacoma*, 6 Wash. 138; *Jett v. Redmond*, 78 Ind. 316; *In re Department of Public Parks*, 86 N. Y. 437; *Board of Water Commrs. v. Dwight*, 101 N. Y. 9; *People v. Partridge*, 13 Abb. N. C. 410; *Powell v. Jackson Common Council*, 51 Mich. 129; *Calvo v. Westcott*, 55 N. J. L. 78; *Luehrman v. Taxing Dist.*, 2 Lea, 425; *Ex parte Moore*, 62 Ala. 471; *Attorney General v. Amos*, 60 Mich. 372; *Frost v. Wilson*, 70 Mo. 664; *Jacksonville v. Basnett*, 20 Fla. 525; *Ex parte Wells*, 21 Fla. 250; *Saunders v. Provisional Municipality*, 24 Fla. 226; *Covington v. Voskotter*, 80 Ky. 219; *San Francisco v. Kiernan*, 98 Cal. 614; *Louisiana v. Pilsbury*, 105 U. S. 278; *State v. Kansas City*, 50 Kan. 508; *State v. Cherry*, 53 N. J. L. 173; *In re Sewer Assessment for Passaic*, 54 N. J. L. 156; *Mayor v. State*, 30 Md. 112; *Potwin v. Johnson*, 108 Ill. 70.

On the other hand, if the subject of an act does not relate to municipal government, the title, though it professes to do that, is insufficient, because the subject of the act is not expressed in its title, and the provisions of the act, so far as they are not expressed in the title, are void: *Wulftange v. McCullom*, 83 Ky. 361; *Blair v. State*, 90 Ga. 326; 35 Am. St. Rep. 206; *Common Council v. Waln*, 57 N. J. L. 143; *In re Road in Borough of Phoenixville*, 109 Pa. St. 44; *Quinn v. Cumberland County*, 162 Pa. St. 55; *Cahoon v. Iron Gate etc. Co.*, 92 Va. 367; *People v. Fleming*, 7 Colo. 230; *State v.*

Murray, 41 Minn. 123; Touzalin v. Omaha, 25 Neb. 817; In re Consolidation of School Dists., 23 Colo. 499.

A constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, has no application to municipal ordinances: Tarkio v. Cook, 120 Mo. 1; 41 Am. St. Rep. 678. On the other hand, it is held in Kansas that such a provision incorporated into the charter of a city is mandatory upon the city council, and that if the title of an ordinance clearly indicates, and the ordinance actually contains, two separate and distinct subjects, having no necessary connection with each other, such ordinance is void in toto from that fact, without reference to any other question: Missouri Pac. Ry. Co. v. Wyandotte, 44 Kan. 32. Compare subdivision "Taxes," *infra*.

Officers.—The title of an act relating to officers and their fees and salaries, investigation of conduct, duties, et cetera, is sufficient where the subject of the act is expressed in its title, and the provisions of the act are germane to the general subject expressed: Henderson v. State, 137 Ind. 352; Benson v. Christian, 129 Ind. 535; Lynch v. Chase, 55 Kan. 367; Rogers v. Morrill, 55 Kan. 737; State v. Hyde, 129 Ind. 296; John v. Reaser, 31 Kan. 406; Stone v. Brown, 54 Tex. 330; State v. Ranson, 73 Mo. 78; Hoke v. Commonwealth, 79 Ky. 567; Commonwealth v. Bailey, 81 Ky. 395; State v. Slover, 134 Mo. 10; People v. Backus, 11 N. Y. App. Div. 147. Thus the title, "An act providing for the appointment of committees to investigate the affairs of state institutions and conduct of officers," is comprehensive enough to cover legislation authorizing reports of such committees and making such reports effectual; Rogers v. Morrill, 55 Kan. 737; Lynch v. Chase, 55 Kan. 367.

But if an act concerning official matters contains matter not germane to the subject expressed in the title, the statute is to that extent inoperative and void, as not having its subject expressed in its title: State v. Porter, 53 Minn. 279; Evans v. Willistown Tp., 168 Pa. St. 578; State v. Hoadley, 20 Nev. 317; Brooks v. Hydorn, 76 Mich. 273; McGregor v. Allen, 33 Ia. Ann. 870; State v. Hallock, 19 Nev. 384; State v. McCann, 4 Lea, 1; Wilkerson v. Belknap Sav. Bank, 52 Kan. 718; State v. Nomland, 3 N. Dak. 427; 44 Am. St. Rep. 572.

Railroads.—The title of an act relating to railway companies is sufficient where the general subject is indicated in the title, and the provisions of the act are germane to the subject expressed in the title. If the object of the legislation is expressed in its title, the title is sufficient, and it is not rendered insufficient because the means and instrumentalities required to accomplish the purpose of the act are inserted in the body thereof: State v. Lake City, 25 Minn. 404; Vail v. Easton etc. R. R. Co., 44 N. J. L. 237, 240; Continental Imp. Co. v. Phelps, 47 Mich. 299; Toledo etc. Ry. Co. v. Dunlap, 47 Mich. 456; Dacres v. Oregon Ry. & Nav. Co., 1 Wash. 525; Railroad v. Crider, 91 Tenn. 489; Frazier v. Railway Co., 88 Tenn. 138; Floyd v. Perrin, 30 S. C. 1; Belleville etc. R. R. Co. v. Gregory, 15 Ill. 20; 58 Am. Dec. 589; State v. Board of Commrs., 40 Kan. 65; Abington v. Cabeen, 106 Ill. 200; Goldsmith v. Rome R. R. Co., 62 Ga. 473; Gleseke v. County of San Joaquin, 109 Cal. 489; San

Antonlo v. Mehaffy, 96 U. S. 312; *Unity v. Burrage*, 103 U. S. 447, 458; *Mahomet v. Quackenbush*, 117 U. S. 508; *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656. The constitutional requirement that the object of an act shall be expressed in its title does not, in the case of railroad enactments, any more than in other laws, require the title to set forth a detailed statement, or an index or abstract, of its contents; nor does it prevent uniting in the same act numerous provisions having one general object fairly indicated by its title: *Monclair v. Ramsdell*, 107 U. S. 147; *Missouri Pac. Ry. Co. v. Harrelson*, 44 Kan. 253; *Frazier v. Railway Co.*, 88 Tenn. 138; *Goldsmith v. Rome R. R. Co.*, 62 Ga. 473.

A title of an act respecting railroads is, however, sufficient only so far as the subject of the enactment is expressed in the title. All provisions of such an act, not germane to the subject expressed in the title, are void: *Thomas v. Wabash etc. Ry. Co.*, 40 Fed. Rep. 126; *Missouri etc. Ry. Co. v. Long*, 27 Kan. 684; *Peck v. San Antonio*, 51 Tex. 490; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100; *Ridge Avenue etc. Ry. Co. v. Philadelphia*, 124 Pa. St. 219. Thus, an act entitled, "An act to incorporate the San Antonio and Mexican Gulf Railroad, and which provides that certain towns may issue bonds to aid in the construction of the railroad, does not have its object expressed in its title: *Giddings v. Antonio*. 47 Tex. 548; 26 Am. Rep. 321. Compare subhead, "Corporations," *supra*.

Taxes.—The title of an act relating to taxation is sufficient, where the subject of taxation is expressed in the title, and the provisions of the statute are germane to the general subject expressed in its title. This principle applies to amendatory repealing and supplementary acts, as well as to original acts. The title of an enactment concerning taxation is not insufficient if the subject of taxation is expressed in the title, although the means and instrumentalities required to accomplish the purpose of the act are expressed in the body thereof. It is not necessary for the title of a taxing act to name all the objects of taxation, neither is the act to be confined to one class of property, if the title is broad enough to cover other classes: *Gibson County v. Pullman etc. Car Co.*, 42 Fed. Rep. 572; *County Commrs. v. Franklin R. R. Co.*, 34 Md. 159, 163; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *State v. Smith*, 35 Minn. 257; *State v. County Court*, 128 Mo. 427; *State v. Hammer*, 42 N. J. L. 435; *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46; *Ensign v. Barse*, 107 N. Y. 329; *Commonwealth v. Martin*, 107 Pa. St. 185; *Bradley v. Pittsburgh*, 130 Pa. St. 475; *Commonwealth v. Wilkes-Barre etc. Ry.*, 162 Pa. St. 614; *Bruce v. Pittsburg*, 166 Pa. St. 152; *Commonwealth v. Henderson*, 172 Pa. St. 135; *National Bank v. Commissioners*. 14 Fed. Rep. 239; *Kings County v. Johnson*, 104 Cal. 198; *Catron v. Board of County Commrs.*, 18 Colo. 553; *Carson v. Mayor of Forsyth*, 94 Ga. 617; *Potwin v. Johnson*, 108 Ill. 70; *Blake v. People*. 109 Ill. 504; *Bitters v. Board of Commrs.*, 81 Ind. 125; *State v. Board of Commrs.*, 41 Kan. 630; *Commonwealth v. Godshaw*, 92 Ky. 435; *State v. Pillsbury*, 31 La. Ann. 1; *Tillotson v. Gage*, 97 Mich. 585; *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 578; *Farmers' etc. Trust Co. v. Oregon etc. Ry. Co.*, 24 Fed.

Rep. 407; Reynolds v. Bowen, 138 Ind. 434, 448; Pennington v. Woolfolk, 79 Ky. 13.

Thus, the title of an act which imposes a tax sufficiently defines the object to which the tax is to be applied, when it declares it to be "to obtain revenue": Commonwealth v. Brown, 91 Va. 762. An act which declares dogs to be personal property and the subject of larceny has its title sufficiently expressed by the title, "An act for the taxation of dogs and the protection of sheep": Commonwealth v. Depuy, 148 Pa. St. 201. If the board of education of Richmond county is one of the county authorities, and the legislature can grant to such board the power of taxation for school purposes, it may, under the title, "To regulate public instruction in the county of Richmond," authorize such school board to levy a tax for school purposes; and the act will not be unconstitutional as containing matter different from its title: Smith v. Bohler, 72 Ga. 546. A tax act may provide remedies for the collection of the tax mentioned in its title, and may provide for an indictment as a means to the end for which the act is to be passed; and, although its details are elaborate and minute, the act is valid so long as there is nothing in such details different from what the title expresses: Brown v. State, 73 Ga. 38. That portion of a statute entitled, "An act to define the duties, powers, qualifications, and liabilities of assessors of taxes, and to regulate their compensation," which refers to boards of equalization, is not disconnected from, or inappropriate to, the general object of the act as expressed in the title. The duties of the assessor and of the board of equalization are closely connected, mutually dependent, and conveniently and appropriately defined in the same: International etc. R. R. Co. v. Smith County, 54 Tex. 1, 12.

On the other hand, if the title of an act purports to be on the subject of taxes, or taxation, all matters of legislation contained in the statute, which are not expressed in its title, or which are not germane to the subject therein expressed, are void. Thus, an "act to tax intestates' estates, gifts, legacies, and collateral inheritance in certain cases," does not express a purpose to tax real estate devised, and the provisions of the act for that purpose are, therefore, inoperative: Grossman v. Hancock, 58 N. J. L. 139. So, "an act to tax and regulate" certain named foreign corporations cannot contain any provision in relation to any other foreign corporation: Oregon etc. Co. v. Rathbun, 5 Saw. 32. So "an act to require all corporations to pay a fee or license for the use of the state before commencing business in the state," does not apply to, or include, a foreign insurance company, already lawfully doing business here on the day of the enactment: State v. Hartford Fire Ins. Co., 99 Ala. 221. And if the body of a law contains provisions for the collection of municipal taxes, while no reference to this matter is made in the title, the act is void as not expressing its subject matter in the title. Hence, municipal taxes cannot be collected thereunder, and a tax sale under the act is void: Mayor v. Lewis, 12 Lea, 180; Bugher v. Prescott, 23 Fed. Rep. 20.

Miscellaneous Illustrations.—The principles above discussed and illustrated have been applied in determining the sufficiency of titles

to acts concerning jails, prisons, and reformatories: *Daubman v. Smith*, 47 N. J. L. 200; *In re Sanders*, 53 Kan. 191; *State v. Lewin*, 53 Kan. 679; *Prison Assn. v. Ashby*, 93 Va. 667; *Ex parte Liddell*, 93 Cal. 633; *Washington v. State*, 28 Tex. App. 411; the location and construction of a levee: *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308; the regulation of actions for libel: *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707; licenses: *Johnson v. Asbury Park*, 58 N. J. L. 604; limitations of actions: *Denham v. Holeman*, 26 Ga. 182; 71 Am. Dec. 198; *Morgan v. Des Moines*, 54 Fed. Rep. 456; *McElwee v. McElwee*, 97 Tenn. 649; *Gatling v. Lane*, 17 Neb. 80; *lis pendens*: *Sheasley v. Keens*, 48 Neb. 57, 64; local laws: *Unity v. Burrage*, 103 U. S. 447, 458; *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235; *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642; marriage licenses: *People v. McGlaughlin*, 108 Mich. 516; mechanics' liens: *Randolph v. Builders etc. Supply Co.*, 106 Ala. 501; mines and coal mines: *Francais v. Soms*, 92 Cal. 503; *State v. Murlin*, 137 Mo. 297; mortgage foreclosures: *Gillitt v. McCarthy*, 34 Minn. 318; navigation, or the regulation of steam vessels, as to fire screens, etc: *Burroughs v. Delta Transp. Co.*, 106 Mich. 582; opium smoking: *State v. Ah Sam*, 15 Nev. 27; 37 Am. Rep. 454; *Ex parte Mon Luck*, 29 Or. 221; 54 Am. St. Rep. 804; *Ex parte Yung Jon*, 28 Fed. Rep. 308; plank roads and plank road companies: *Crawfordsville etc. Co. v. Fletcher*, 104 Ind. 97; *Grand Rapids v. Judge*, 93 Mich. 469; *Canal Street etc. Co. v. Paas*, 95 Mich. 372; police regulations of a city involving the appointment of detectives: *State v. Bennett*, 102 Mo. 356; public lands, including tide lands and alien land law: *Snyder v. Compton*, 87 Tex. 374; *Case v. Loftus*, 43 Fed. Rep. 839; *Gunter v. Texas Land etc. Co.*, 82 Tex. 496; *State v. Mallinson*, 82 Tex. 504; public use, appropriation of land to: *Easton etc. R. R. Co. v. Central R. R. Co.*, 52 N. J. L. 267; roads: *In re Road etc.*, 181 Pa. St. 390; schools: *State v. Macklin*, 4 Mo. App. 335; *Affholder v. State*, 51 Neb. 91; *Boring v. State*, 141 Ind. 640; Sunday: *Fehr v. State*, 36 Tex. Crim. Rep. 93; *Ragio v. State*, 86 Tenn. 272; telegraph companies: *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; tenement-house cigars: *In re Paul*, 94 N. Y. 497; townships: *Dolese v. Pierce*, 124 Ill. 140; *Hyde Park v. Chicago*, 124 Ill. 156; trademarks, labels, and forms of advertising: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304; anti-trusts: *In re Pinkney*, 47 Kan. 89; usury, or interest: *Maynard v. Marshall*, 91 Ga. 840; vaccination: *Abeel v. Clark*, 84 Cal. 226; validating prior and imperfect laws or proceedings: *State v. Parker*, 61 Tex. 265; *Read v. Plattsouth*, 107 U. S. 568; *Jonesboro City v. Cairo*, 110 U. S. 192; *Oteo County v. Baldwin*, 111 U. S. 1; *Ackley School Dist. v. Hall*, 113 U. S. 135; wages or salaries, securing: *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; 42 Am. St. Rep. 613; *Fidelity Ins. etc. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372; warehousemen and warehouse receipts: *State v. Koshland*, 25 Or. 178; *Sykes v. People*, 127 Ill. 117; water rights: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884; 50 Am. St. Rep. 585; witnesses: *Hall v. Leland*, 64 Minn. 71; and wills: *Garrison v. Hill*, 81 Md. 551; these cases showing that the title of an act is sufficient if the subjects embraced in the act, but not specified in

the title are congruous, and have a natural connection with, or are germane to, the subject expressed in the title; but that where this is not the case, all parts or portions of an act, not within the purview of the title, are unconstitutional, inoperative, and void.

JARVIS v. SEELE MILLING COMPANY.

[173 ILLINOIS, 192.]

DEFINITIONS.—AN APPURTENANCE IS A THING used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant.

EASEMENTS—CONVENIENCE.—To constitute an easement the right or privilege must be necessary or essential to the proper enjoyment of the estate granted. A mere convenience is not an easement.

DEEDS — PASSING OF APPURTENANCES. — Appurtenances will pass by a deed or grant of conveyance, even if the word "appurtenance," or a similar expression, is not used in the instrument.

MILLS—POND AND DAM—NECESSARY APPURTENANCE.—If mill property has been granted, and a controversy arises over the grantee's right to use a pond and dam connected with the mill, the question to be determined is not whether the mill can be operated without the mill-pond, but whether its use passed as a necessary appurtenant of the mill property.

MILLS — APPURTENANCE — EASEMENT IN OTHER LANDS.—If mill property is granted, an easement in other lands of the grantor, used in the enjoyment of the property, will pass by the grant as an appurtenance.

John G. Irwin, for the appellant.

Travous & Warnock, for the appellee.

193 WILKIN, J. This is an action of trespass, begun in the circuit court of Madison county by appellant, against appellee. The declaration alleges: 1. That defendant, the Seele Milling Company, by means of a dam, caused water from a mill-pond to back upon and overflow certain lands of plaintiff; and 2. That defendant, in reconstructing an old dam, raised it higher than before, causing the water to overflow more of plaintiff's land than formerly. Defendant pleaded the general issue, and by stipulation all matters relevant as a defense were to be introduced in evidence under that plea. By agreement of counsel a jury was waived and the case heard by the court. The issues were found for the defendant, and judgment rendered against plaintiff for costs. Plaintiff appeals to this court.

It appears that in 1852 a mill was built on a lot adjoining that now owned by plaintiff, and a dam was constructed which

caused the water in a small stream to overflow the latter property. The mill and the overflowed land belonged at that time to separate owners, but in 1867 the title to both lots became united in Thomas Thorp and John Carney, owners in common. In 1870 they mortgaged the entire property to secure a loan of fifteen thousand dollars. Subsequently the mortgage was foreclosed, and in that proceeding the lands were sold in separate lots. The mill property was sold first to Frank Bauer, and failing to bring the amount of the debt, the property described in the declaration, which included the overflowed land, was also sold, to one Cabanne, from whom plaintiff derives ¹⁹⁴ her title thereto. Defendant gets title to the mill property by mesne conveyances from Bauer. The dam continued to be used for mill purposes until in 1897, when it was partially destroyed by a freshet. At this time notice was given by plaintiff to defendant not to rebuild the dam, she claiming that the only right the mill company or its predecessors then had, or ever had, to dam the water in the stream and cause it to overflow her land was by the simple acquiescence of herself and her predecessors, and defendant's right was no more than a revocable parol license. The dam was rebuilt, and plaintiff brought this suit in trespass.

The contention of appellant is, that the owners of the mill property had acquired no right, by prescription, to overflow her land, and that they had no such right under their deed as an appurtenance to the mill. Upon the trial of the case plaintiff sought to prove, and we think established the fact, that up to the time the mill property and plaintiff's lot became united in Thorp and Carney, the owners of the mill had no right to overflow the other property, but had merely the tacit consent or permission of the owners thereof. But the question now is, Did the sale, under the mortgage, of the mill property, being part of the whole mortgaged premises, under the circumstances that the owner of all the property from 1867 to 1875 had maintained the mill-pond and dam for milling purposes, give the purchaser an easement in the overflowed land as an appurtenance to the mill property? Appellee contends that it did. True, the deed, pursuant to the foreclosure proceedings, described the property by metes and bounds, without the word "appurtenances"; but it has been held that "where one grants a mill or other improvement, for the enjoyment of which an easement is used over or upon other lands belonging to the grantor, such easement passes by the grant, as an appurtenance to the thing granted": *Hadden v.*

Shoutz, 15 Ill. 581. The pond and dam in connection with the mill, as ¹⁹⁵ well as the mill itself, were contemplated by the parties to the mortgage, because it appears that such pond and dam gave the land its principal value, and the dam had been maintained and the pond used for such purpose for many years prior to the making of the mortgage.

An appurtenance is defined to be "a thing used with, and related or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant": 2 Am. & Eng. Ency. of Law, 2d ed., 521. It is true, a mere convenience is not an easement, but the right or privilege must be necessary or essential to the proper enjoyment of the estate granted. The question here is not, as assumed by appellant, whether the mill can be operated without the mill-pond, but whether the use of the mill-pond passed as a necessary appurtenant of the mill property. The deed or grant of conveyance need not contain the word "appurtenance," or similar expression, in order that appurtenances will pass thereby: *Shelby v. Chicago etc. R. R. Co.*, 143 Ill. 385; *Morrison v. King*, 62 Ill. 30.

We think it clear that appellee has a right to the easement claimed, and its contention to that effect must be sustained. Appellant stands in no better position than her grantor, whose title was subject to the easement of the mill property.

On the question as to the new dam raising the water higher on the land of plaintiff than formerly, the evidence is uncertain and somewhat conflicting. The new dam is wider and the chute differently constructed, yet it appears the water is kept substantially at the same level as before.

On all propositions of law submitted the ruling of the trial court was in conformity with the views herein expressed. Its judgment will be affirmed.

AN APPURTENANCE is a thing belonging to another thing as principal, and passing as an incident thereto: *Badger Lumber Co. v. Marion etc. Co.*, 48 Kan. 182; 30 Am. St. Rep. 301.

EASEMENTS—APPURTENANCES—DEEDS.—A mere convenience never passes as an appurtenance or incidental right: *Note to Tabor v. Bradley*, 72 Am. Dec. 502. The thing claimed to pass as appurtenant must be necessary to the enjoyment of the thing granted: See monographic note to *Strickler v. Todd*, 13 Am. Dec. 657, on what passes as appurtenant. An easement not of strict necessity will not pass by an implied grant, unless it is apparent and continuous: *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550.

DEEDS—APPURTENANCES—EASEMENTS.—The words "privileges and appurtenances" are unnecessary in a deed, as a grant of

the land passes them without their being mentioned. A right to flow land will so pass: *Berry v. Billings*, 44 Me. 416; 69 Am. Dec. 107. The grant of the principal thing carries with it the incidents, privileges, and appurtenances essential to its use: Note to *Berry v. Billings*, 69 Am. Dec. 110; *Seymour v. Lewis*, 13 N. J. Eq. 439; 78 Am. Dec. 108; without being mentioned: *Morgan v. Mason*, 20 Ohio, 401; 55 Am. Dec. 464. An easement will pass an incident to land: *Morgan v. Mason*, 20 Ohio, 401; 55 Am. Dec. 464. The grant of the principal thing carries everything necessary to the beneficial enjoyment of the thing granted which the grantor has power to convey: *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219; note to *Morgan v. Mason*, 55 Am. Dec. 472. Other cases hold that an easement, not expressly mentioned in a deed, does not pass, unless it naturally and necessarily belongs to the premises: Note to *Bumstead v. Cook*, 61 Am. St. Rep. 296.

MILLS—APPURTENANCES—EASEMENT IN OTHER LANDS. A right to flow land will pass by a deed of mill property: *Berry v. Billings*, 44 Me. 416; 69 Am. Dec. 107; note to *Baker v. Bessey*, 40 Am. Rep. 383; monographic note to *Strickler v. Todd*, 13 Am. Dec. 657-660, on what passes as appurtenant. Contra, *Tabor v. Bradley*, 18 N. Y. 109; 72 Am. Dec. 498. It will not pass with a grant of the land alone: *Wilcoxon v. McGhee*, 12 Ill. 381; 54 Am. Dec. 409.

SANITARY DISTRICT OF CHICAGO *v.* MARTIN.

[173 ILLINOIS, 243.]

TAXES.—THE PROPERTY OF MUNICIPAL CORPORATIONS is subject to taxation unless there is a law exempting it.

TAXES—EXEMPTION—CONSTRUCTION OF STATUTE. Tax exemption statutes are strictly construed, whether the property is owned by a private person or a municipal corporation, and all reasonable intendments are indulged in favor of the state policy, which is to restrict rather than extend exemptions from taxation.

TAXES.—THE WORDS, "PUBLIC GROUNDS," used in a statute exempting such grounds from taxation, refer to such grounds only as are open for the designated use to the general public.

TAXES—EXEMPTION.—LANDS ACQUIRED BY THE SANITARY DISTRICT OF CHICAGO, outside of such district, and used as a channel to carry off and render innocuous the sewage of the district, principally of the city of Chicago, so that the waters of Lake Michigan, from which its inhabitants obtain their water supply, may not be contaminated thereby, are the property of the district, which is a municipal corporation, and not of the state, and the public, outside the limits of the district, have no interest in them. They are, therefore, not exempt from taxation either as state property or as "public grounds."

F. W. C. Hayes and Haley & O'Donnell, for the appellant.

Garnsey & Knox, for the appellee.

245 CARTER, J. This is an appeal from a decree of the circuit court of Will county, holding that the lands of appellant

within said county were subject to general taxation. Part of these lands, namely, seven hundred and eighty-five and eighteen hundredths acres, lie in DuPage township, and were assessed the sum of two hundred and sixty dollars and seven cents for state, county, city, town, and village taxes for the year 1894; and the rest of the lands, namely, five hundred and eight and fifty-nine hundredths acres, lie in Lockport township, and the general taxes on the same for the year 1894 were assessed at one hundred and thirty-two dollars and eighty-three cents. Appellant refused to pay these taxes, and they were returned by appellee as delinquent, and he advertised the lands for sale to pay such taxes, interest, and penalties. Appellant filed its bill in the circuit court of Will county to enjoin the appellee from attempting to collect said tax and from offering these lands for sale to pay the same, claiming that said lands were exempt from general taxation. ²⁴⁶ On the hearing, the court entered a decree finding, among other things, that the lands were not subject to sale for unpaid taxes, but that they were subject to taxation and to judgment for unpaid taxes, and the temporary injunction restraining the collector from selling the same was made perpetual, but the decree permitted him to pursue any proper remedy for the collection of said taxes other than by selling the lands. The sanitary district has appealed from so much of this decree as finds these lands are not exempt but are subject to taxation, and contends here that the decree in this respect is erroneous.

Whether these lands are exempt or not from general taxation is the only question in the case. Appellant insists that the property of a municipal corporation is exempt from taxation, and that only where it is clear that the legislature intended to subject it to taxation can it be taxed for general state and municipal purposes; that appellant is a municipal corporation, and that the lands owned by it at the time of the filing of this bill were exempt from taxation, as being "public grounds used exclusively for public purposes." Appellee contends that the property of municipal corporations such as this one has not been exempted from taxation by the legislature; that these lands are the exclusive property and under the exclusive control of appellant, and are not "public grounds used exclusively for public purposes," within the meaning of that term as used in the statute; that such public grounds" must be those to which the public have a right to resort and which they have a right to use; that the lands here in question are without the corporate limits of

appellant, and if this claim of exemption be allowed it will result in withdrawing these lands from taxation by the authorities of Will county, for the sole benefit of a municipal corporation lying wholly in another county.

The act of May 29, 1889, under which appellant is organized, was made the subject of elaborate opinions by this court in *Wilson v. Sanitary Dist.*, 133 Ill. 443, and in ²⁴⁷ *People v. Nelson*, 133 Ill. 565, and appellant was held to be a municipal corporation.

It is provided by section 1 of article 9 of the constitution of this state, that "the general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property"; and in section 3, that "the property of the state, counties, and other municipal corporations, both real and personal may be exempted from taxation, but such exemption shall be only by general law." In the exercise of the power thus conferred upon it to make certain exemptions from taxation, the legislature has, by section 2 of the revenue act, specified in ten paragraphs the property that shall be exempt. The language of that portion of section 2 that is applicable here is as follows: "All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say: 5. All property of every kind belonging to the state of Illinois; 9. All market-houses, public squares or other public grounds used exclusively for public purposes; all works, machinery, and fixtures belonging exclusively to any town, village, or city, and used exclusively for conveying water to such town, village, or city."

It was said in an early case in this state that the assessment of public taxes upon the public property of the state, county, or municipal corporations was a mere question of policy, and that the power existed to make it bear its share: *Higgins v. Chicago*, 18 Ill. 276. Whatever may be the law in other states, the language of the constitution of this state plainly implies that the property of municipal corporations is subject to taxation unless there is a law exempting it: *Cook County v. Chicago*, 103 Ill. 646. The language employed in section 2 of the revenue act shows that it was not the legislative intent to exempt all property, of every kind and character, ²⁴⁸ belonging to municipal corporations: *Matter of Swigert*, 123 Ill. 267. It was also said in the latter case, which involved the claim of an exemption from taxation by the local authorities of a bridge be-

longing to the city of Moline and lying without the corporate limits of the city, that "exemptions from the burdens of taxation are to be construed strictly, and cannot be made, by judicial construction, to embrace other subjects than those plainly expressed in the act": Citing *People v. Western Seaman's etc. Soc.*, 87 Ill. 246. Substantially the same language was used in *People v. Chicago*, 124 Ill. 636, which was a claim of an exemption from taxation of a farm belonging to the city, lying outside of the corporate limits of the same, not actually used for public purposes: Citing *Matter of Swigert*, 119 Ill. 83; 59 Am. Rep. 789. See, also, *Chicago v. People*, 80 Ill. 384, and cases cited.

It will thus be seen that the same rule requiring a strict construction of statutes exempting property from taxation belonging to private persons or corporations has been applied to municipal corporations also. Nor is this view in conflict with what was decided in *People v. Salomon*, 51 Ill. 37, *McCormick v. South Park Commrs.*, 150 Ill. 516, and other cases cited, decided by this court. It has never been held by this court, under the constitution and statutes now in force, that the mere ownership of property by a municipal corporation is sufficient to exempt it from taxation, but its exemption must depend on the fact that it is included within the provisions of the statute enacted for the purpose in conformity to the constitution. It has been, and is, the public policy of this state, as shown by the provisions of the constitution and the acts of the general assembly, to restrict rather than to extend exemptions from taxations, "so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." And this is eminently wise and just, for all property withdrawn from taxation increases the burdens upon what remains. It has long ²⁴⁰ been the rule of this court that no property will be held exempt from its share of the common burden unless it clearly appears to have been included in the exemptions provided for by law, and all reasonable intendments will be indulged in favor of the state: *Bloomington Cemetery Assn. v. People*, 170 Ill. 377.

It is virtually conceded by counsel that the claim of exemption from taxation rests wholly on the ninth paragraph of section 2 of the revenue act. Some claim of exemption is made by appellant under the fifth paragraph, of which we shall speak later; but the main contention is, that the exemption exists under the ninth. That part of the ninth paragraph here applicable exempts "all market-houses, public squares or other public grounds

used exclusively for public purposes." Are these lands, belonging to the sanitary district of Chicago, "public grounds," and are they "used exclusively for public purposes?"

It is contended that the words "public grounds" must be interpreted according to the general rule that general words following the specific enumeration of objects or things will be held to include only such objects or things as are of the same kind as those specifically enumerated. Market-houses and public squares are the only objects enumerated. It has been said that a public market is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale: *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282; and that a public square is intended for beauty and adornment and for the health and recreation of the public: *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540. Both public markets and public squares are for the use of the public—of all persons who, in the pursuit of business or pleasure, may have occasion to resort thereto, subject, of course, to whatever municipal regulations may be in force regulating the use of the same. They are in this respect similar in their use to streets and alleys. The "public²⁵⁰ grounds" exempt from taxation referred to in this paragraph would, therefore, under this rule of construction be construed to be grounds which are open for the designated use to the public generally, and this view would seem to be emphasized by the qualifying clause, "used exclusively for public purposes."

It can hardly be said that the lands of the appellant are open to the use of the public generally for drainage purposes. The court below has found that these "lands were all necessary for the purpose of constructing the channel for the said district, and its adjuncts thereto, for the purpose of drainage of said sanitary district in accordance with the provisions of the act of the legislature authorizing the creation of said district, and that said lands have been used and were acquired by said district exclusively for said purpose." The sanitary district embraces that portion of the city of Chicago north of Eighty-seventh street, except two small recent additions to the city, and almost forty-two square miles of Cook county west of Chicago, and is wholly confined within the limits of Cook county. These lands claimed to be exempt, instead of being used exclusively by the public—that is, the general public—are to be used as a channel to carry off and render innocuous the sewage of the district, principally of the great city of Chicago, so that the waters of Lake Michigan, from which its inhabitants obtain their water supply, may not be

contaminated thereby. They are outside of the district and within the limits and jurisdiction of Will county. Section 7 of the act under which the district is organized provides: "The board of trustees of any sanitary district organized under this act shall have power to provide for the drainage of such district by laying out, establishing, constructing, and maintaining one or more main channels, drains, ditches, and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause ²⁵¹ such channels or outlets to accomplish the end for which they are designed in a satisfactory manner; also to make and establish docks adjacent to any navigable channel made under the provisions hereof for drainage purposes, and to lease, manage, and control such docks, and also to control and dispose of any water power which may be incidentally created in the construction and use of said channels or outlets, but in no case shall said board have any power to control water after it passes beyond its channel, waterways, races, or structures into a river or natural waterway or channel, or water power, or docks situated on such river or natural waterway or channel; provided, however, nothing in this act shall be construed to abridge or prevent the state from hereafter requiring a portion of the funds derived from such water power, dockage, or wharfage to be paid into the state treasury, to be used for state purposes. Such channels or outlets may extend outside the territory included within such sanitary district, and the rights and powers of said board of trustees over the portion of such channel or outlet lying outside of such district shall be the same as those vested in said board over that portion of such channels or outlets within the said district." Section 25 provides that "any district formed hereunder shall have the right to permit territory, lying outside its limits and within the same county to drain into and use any channel or drain made by it, . . . and any district formed hereunder is hereby given full power and authority to contract for the right to use any drain or channel which may be made by any other sanitary district." By section 24 such channel, when completed and the water turned therein to the amount of three hundred thousand cubic feet of water per minute, is declared a navigable stream.

We think it can hardly be said that these provisions give the public the right to use this channel, except that after its completion it is declared to become a navigable stream, which would give the public an easement of passage ²⁵² over the water in the

same, but no right to use the same as a drain or a channel for sewage seems to have been given or reserved. The drain or channel to be constructed is intended, apparently, wholly and solely for the benefit of the inhabitants of the sanitary district, and not for the benefit of the public at large. The district is authorized to make and establish docks, and to dispose by lease of any water power, for its own benefit, that may be created in the construction and use of the channel. In this way it is quite possible that the district may derive a large revenue from the use of the channel.

It seems to us that it is plain, from all the foregoing provisions, that the public outside of the limits of the district have no interest in the same, and that these lands in Will county are not "public grounds" in the sense those words were used by the legislature, nor are they to be "used exclusively for public purposes." The property claimed to be exempt must be owned and used in the manner specified in the law: *Matter of Swigert*, 123 Ill. 267, and cases there cited.

But it is said by counsel for appellant that this corporation is but an arm of the government of the state; that its property is in the nature of state property, and is therefore exempt under the fifth paragraph of section 2 of the revenue act. We cannot agree with this contention. The property acquired by the district is the property of the district, and not of the state, and the fact that the state might have constructed this drain itself in nowise makes its property that of the state, nor exempts it from taxation unless clearly within one of the provisions of the statute.

Finding no error the decree of the circuit court is affirmed.

TAXES—MUNICIPAL CORPORATIONS.—The property of a municipal corporation not necessary to the exercise of its municipal governmental functions is not exempt from state taxation, except in consideration of public services: *Commonwealth v. Makibben*, 90 Ky. 384; 29 Am. St. Rep. 382. The public property of a municipal corporation, used only for governmental purposes, is exempt from taxation: See monographic note to Board of Commrs. etc. v. Ottawa, 33 Am. St. Rep. 404, on the taxation and assessment of public property.

TAXES—EXEMPTIONS.—The right of taxation is never presumed to be surrendered by the sovereign power, and such surrender is never made, unless it is the result of express terms or necessary inference: Note to *Commonwealth v. Makibben*, 29 Am. St. Rep. 389. The exemption of property from taxation is a question of policy, and not of power: *State v. Bank of Smyrna*, 2 Houst., 99; 73 Am. Dec. 699. All laws exempting property from taxation are to be strictly construed, and all reasonable intendments indulged in favor of the state: Note to *Commonwealth v. Makibben*, 29 Am. St. Rep. 389.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY v. GILLISON.

[173 ILLINOIS, 264.]

PLEADING—PLEA OF STATUTE OF LIMITATIONS—WHEN DEMURRABLE.—A plea of the statute of limitations, though perfect in form, is demurrable where it is interposed to an amended complaint filed more than two years after the injury alleged in an action for negligence.

PLEADING—PLEA OF STATUTE OF LIMITATIONS—WHEN DEMURRER TO SHOULD BE SUSTAINED.—A demurrer to the plea of the statute of limitations, interposed to an amended complaint filed more than two years after the injury alleged in an action for negligence, should be sustained, if the amended count merely restates the same cause of action made by the original count filed in time.

MASTER AND SERVANT—WHAT RISKS ARE NOT ASSUMED.—A servant does not, from the mere fact of employment, assume risks not ordinarily connected with the service, and which are attributable to the master's failure to exercise reasonable care and prudence.

MASTER AND SERVANT—ASSUMPTION OF RISK—DEFECTIVE DRAWBARS.—A railroad brakeman does not assume the risk of injury arising from defective drawbars.

MASTER AND SERVANT—COMBINED NEGLIGENCE OF MASTER AND FELLOW-SERVANT—MASTER'S LIABILITY.—A master is liable to his servant for an injury caused by the combined negligence of the master and a fellow-servant, where it would not have happened but for the master's negligence.

MASTER AND SERVANT—INSPECTION OF APPLIANCES—MASTER'S DUTY.—A railroad company is not excused from the duty of discovering the defective condition of a cracked drawbar, in the absence of any evidence that the situation was such as to excuse such failure.

APPEAL—ALLEGED VARIANCE—WHEN NOT REVIEWABLE.—An alleged variance between the allegation and proof is not reviewable on appeal as a question of law, unless it is called to the attention of the trial court and a ruling had thereon.

EVIDENCE—BROKEN DRAWBAR—ADMISSIBILITY.—If a railroad train breaks in two, the lapse of two hours between the breaking and an examination, by a witness, of the broken drawbar does not preclude him from testifying that he found it broken off, that the upper part of the break was bright and new, and that the lower half was old and rusty.

MASTER AND SERVANT—RAILROAD TRAIN—COMBINED NEGLIGENCE OF MASTER AND FELLOW-SERVANT—INJURY CAUSED BY DEFECTIVE DRAWBAR—MASTER'S LIABILITY.—If a railroad train breaks in two by reason of a defect in a drawbar, which might have been discovered by inspection, and the brakeman, upon discovering the separation, signals the engineer to go ahead and boards the rear section to set brakes, in obedience to the company's rules to make every effort, in such cases, to stop the rear section and to get the head section out of the way so as to avoid a collision, but is knocked from the train by a collision between the two sections, and injured, he may recover of the company, although his fellow-servant, the engineer, contributed to the injury by not keeping the forward section out of the way.

E. E. Osborn, A. W. Pulver and Lloyd W. Bowers, for the appellant.

James B. McCracken and Albert M. Cross, for the appellee.

267 CARTWRIGHT, J. The appellate court affirmed a judgment against appellant, in favor of appellee, for damages resulting from the loss of his leg while in the service of appellant as a brakeman on its freight train, at its station at Rochelle, Illinois, on the night of May 23, 1894.

More than two years after the injury to plaintiff he filed, by leave of court, an additional count to his declaration, and defendant interposed a plea of the statute of limitations to that count. To the plea so filed plaintiff demurred and the demurrer was sustained. The additional count set up no new cause of action, but alleged the same relation of master and servant between the parties, **268** the same neglect of duty and consequent injury, as in the original declaration filed within the two years. We do not understand it to be claimed that the additional count was anything but a restatement of the same cause of action and in substantially the same way, but it is claimed that the practice of sustaining a demurrer to a plea of the statute of limitations which is perfect in form and without defect is improper, and that the plea called for a replication. It is a sufficient answer to the argument that the established practice in this state is that which was pursued in this case, and if, upon a comparison of the original and amended declarations, it is found that they are different modes of stating the same matter, a demurrer will be properly sustained: *North Chicago etc. Mill Co. v. Monka*, 107 Ill. 340; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185.

At the close of the evidence for plaintiff, defendant interposed a motion to direct a verdict for defendant, and the motion to direct a verdict was renewed after the close of all the evidence. In each instance it was denied, and this is alleged as error, on the grounds that the evidence showed that the injury resulted from a risk assumed by plaintiff when engaging in the employment; that the injury was due to the negligence of his fellow-servant, the engineer; that there was no opportunity for inspection of the defective drawbar, which was alleged as the cause of the injury, and that there was a variance between the allegations and proof.

The freight train on which plaintiff was working came into the station at Rochelle from the west about 10 o'clock at night.

He was the head brakeman, E. A. Mahlman was rear brakeman, and Van Black was engineer. In order to take on two cars from the sidetrack, the engine, with seven cars, was cut off from the train and backed into the sidetrack and coupled to six cars standing there, the first two of which were gondola-cars loaded with stone. The engine then moved up toward the main track ²⁶⁹ with the thirteen cars, and as they were passing plaintiff, who stood on the ground to let the cars pass and turn the switch, he saw that the train had broken in two between the two gondola-cars, and they were some distance apart, with the rear portion following the front on a down grade. The rules of defendant require its employés, in such case, to make every effort to stop the rear section and get the head section out of the way so as to avoid a collision. Plaintiff, in accordance with his duty, notified the rear brakeman, and testified that he gave the engineer a signal with his lantern that the train was broken in two, followed by a signal to go ahead when it became the duty of the engineer to do his utmost to keep the forward part out of the way. The plaintiff then climbed on the second car of the rear portion and set one brake and had started to set another when a collision between the two sections occurred, and he was thrown off the car under the wheels, and the car was pushed forward over him, causing the injury. The separation of the different parts of the train was due to the breaking of a draft-iron. This was a hollow iron about six inches square, and the break was bright and fresh on the upper half while the lower half was rusty, showing that there was an old break and crack in that half of the bar.

It is argued that the breaking apart of the train was one of the ordinary hazards of plaintiff's employment which he took upon himself, and one of the natural perils incident to the performance of his service. If the injury arose from a hazard incident to the employment of a brakeman upon a freight train as it was ordinarily carried on, plaintiff could not complain; but the perils of an unsafe and defective drawbar, which caused this injury, are not shown by any evidence to have been a usual or customary hazard on defendant's cars or trains. Plaintiff did not assume risks which were not ordinarily connected with the service, and which were due to a failure of defendant to exercise reasonable care and prudence. So ²⁷⁰ far as appears, he had no reason to suspect a danger of that kind when engaging in the employment; and the situation is entirely different from that of the employé in the case of *Chicago etc. R. R. Co. v. Ward*, 61

Ill. 130, where he was employed to handle cars that were in bad order and unfit for use; and the risk belongs to a different class from that which caused the injury in *Ryan v. Armour*, 166 Ill. 568, which arose out of the use of appliances, without fault of the master.

If the injury to plaintiff was, in any respect, due to mismanagement of his fellow-servant, the engineer, in handling the front part of the train, that fact would not relieve defendant from liability. The injury could not have happened but for the defective drawbar and the breaking in two of the train, and in such a case there would only be the concurring negligence of the defendant and the engineer. Being injured by such concurrent negligence, plaintiff could recover for his injury from defendant: *Cooley on Torts*, 560; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

It is claimed that there was no opportunity for inspection by defendant of the cars. But there is no evidence that the situation was such as to excuse the failure to examine and discover and remedy the defect. The only evidence is, that the cars were in the possession of defendant and standing on its sidetrack. It does not appear that the crack and broken condition were not discoverable by inspection, and there is nothing apparent to exempt defendant from the discharge of the usual and ordinary duty in that respect.

The variance claimed between the declaration and proof is, that the declaration alleged the breaking of the train in two while starting, and the evidence showed that it broke after it started. If that variance was material it should have been called to the attention of the trial court; but this was not done, either by objection to evidence when offered, or by motion to exclude it when ²⁷¹ the variance became apparent, or in any other way. It was not a ground of the motion to direct a verdict for defendant. Such an objection, when raised as a question of law in this court, must be presented in some way to the trial court, so that there may be a ruling upon it which this court can pass upon: *Libby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191; *Harris v. Shebek*, 151 Ill. 287.

It is objected that the evidence as to the condition of the drawbar above referred to was incompetent and improperly admitted. It consisted of testimony of the rear brakeman, *Mahlman*, as to the condition of the drawbar two hours after the collision. He examined the drawbar and coupling where the train parted, and found that they were coupled and all right with the exception of this break, so that it was proved beyond all doubt

to be the cause of the separation of the train; and the condition that he testified to as to rust was one that could not arise in the interim of two hours after the accident. It is matter of common knowledge that it would require considerable lapse of time to produce such a condition, and the rust on the lower half must have existed at the time the train parted. The fact to be proved was the condition of the drawbar at the time of the accident, but this evidence showed that the condition existed at that time, and could not have been produced between the time of the accident and the examination. The evidence was competent: *Bloomington v. Osterle*, 139 Ill. 120; *Chicago etc. Ry. Co. v. Lewis*, 145 Ill. 67.

Objection is made to the modification by the court of the tenth and twelfth instructions presented by defendant, relating to the question of fellow-servants. But that question was immaterial, and the modification did the defendant no harm.

The judgment of the appellate court is affirmed.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—A person, when he enters the service of another, assumes only such risks and dangers as are usually incident thereto: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633, and note. A servant of a railway company does not assume the risk of the negligence of his employer in failing to have the machinery and appliances in a reasonably safe condition: *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458; 43 Am. St. Rep. 259, and note.

MASTER AND SERVANT—INSPECTION OF APPLIANCES—MASTER'S DUTY.—A railroad company is guilty of negligence in failing to keep appliances used by its servants in repair: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633; and it is liable for an injury caused by a want of a proper inspection of its cars, though the fact that a freight train broke apart when it ought not to have done so is not, of itself, evidence of negligence on the part of the railway company: *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13; 32 Am. St. Rep. 425, and note.

MASTER AND SERVANT—COMBINED NEGLIGENCE—MASTER'S LIABILITY TO INJURED FELLOW-SERVANT.—The negligence of a fellow-servant does not relieve a master from liability to a coservant for an injury which would not have happened had the master done his duty: Note to *Sawyer v. Rumford Falls Paper Co.*, 60 Am. St. Rep. 266; *Gates v. Latta*, 117 N. C. 189; 53 Am. St. Rep. 584; *Norfolk etc. R. R. Co. v. Thomas*, 90 Va. 205; 44 Am. St. Rep. 906; *Coppins v. New York etc. R. R. Co.*, 122 N. Y. 557; 19 Am. St. Rep. 523.

APPEAL.—A QUESTION NOT RAISED at the trial will not be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note. Compare *Green v. Green*, 50 S. C. 514; 62 Am. St. Rep. 846; *Townsend v. State*, 147 Ind. 624; 62 Am. St. Rep. 477.

STATUTE OF LIMITATIONS — DEFENSE — REPLY — DEMURRER.—If the statute of limitations is pleaded as a defense, the matters upon which the plaintiff relies for relief against such defense may be deemed to have been pleaded in his reply thereto:

Note to State v. Parsons, 62 Am. St. Rep. 435. If a complaint clearly shows the plaintiff's cause of action to be barred by the statute of limitations, the defendant must raise that question by demurrer; otherwise it may be presented by answer: *Damon v. Leque*, 17 Wash. 573; 61 Am. St. Rep. 927.

ROCKFORD CITY RAILWAY COMPANY v. BLAKE.

[173 ILLINOIS, 354.]

MUNICIPAL CORPORATIONS—POWER TO DETERMINE WHAT IS NEGLIGENCE.—A city is not clothed with power to determine when, or under what circumstances, a street-car company shall be deemed negligent so as to authorize a recovery by a person injured.

EVIDENCE—STREET RAILWAYS—INADMISSIBILITY OF ORDINANCE UPON QUESTION OF NEGLIGENCE.—A city ordinance requiring street-cars to be stopped to avoid injury to any person on or near the track, upon the appearance of danger, is inadmissible in an action against a street railway company for injuries received by the plaintiff in being thrown under a passing car while attempting to hold a frightened horse.

APPEAL.—HARMLESS ERROR in the admission of evidence is no ground for a reversal of the judgment.

EVIDENCE AS TO CONDITION OF BRAKES ON STREET-CARS—ADMISSIBILITY OF.—In an action against a street railway company to recover damages for personal injuries caused by its negligence in failing to stop a car, evidence as to the condition of brakes on the car at times before the injury is admissible, where it is shown that such condition remained unchanged down to the time of the accident.

A. E. Fisher and R. N. Baylies, for the appellant.

Frost & McEvoy, for the appellee.

354 PER CURIAM. This was an action brought by Mason Blake, a boy twelve years old, against the Rockford City Railway Company to recover for an injury resulting in **355** the loss of a leg on the night of July 12, 1892. On a trial before a jury plaintiff recovered a judgment for two thousand dollars, which, on appeal, was affirmed in the appellate court.

It appears from the evidence that about 9 o'clock on the night of the accident, Louis C. Blake, a brother of the plaintiff, was riding a pony on the streets of Rockford. He came near where the plaintiff and another boy, Roy Warren, were sitting near a post, and got off. The pony seemed to be afraid of something and commenced to back onto the street-car track, and Louis called on his brother to help hold the animal. He took hold of the bridle, and his finger became fastened in the martingale ring,

and as the street-cars approached he was thrown under one of them and received the injury complained of.

Whether the plaintiff was in the exercise of ordinary care at the time of the injury, and whether the street-car company was guilty of negligence which resulted in the injury as charged in the declaration, are questions of fact settled by the judgment of the appellate court in favor of the plaintiff. It is, however, claimed that the court erred in its rulings on the admission of evidence, and under this head it is insisted that the court erred in admitting in evidence section 8 of an ordinance in force at the time of the accident, which reads as follows: "All conductors, motoneers, drivers, and persons employed upon street-cars shall use reasonable and proper care and diligence to prevent injury or damage to persons, teams, or vehicles, and upon the appearance of danger to any such person, team, or vehicle upon or near the track the car shall be stopped, when by so doing such injury or damage may be averted."

It is no doubt true that the city of Rockford had the power, by ordinance, to regulate the speed of street-cars within the city, and perhaps other wholesome police regulations might be adopted in regard to the management and running of cars; but we do not think the city was clothed with power to determine when or under ³⁵⁶ what circumstances a street-car company would be guilty of negligence upon which a recovery might be predicated by a person who may have been injured. It was the duty of the court to instruct the jury in regard to the law by which they should be governed in determining the liability or non-liability of the street-car company for the injury complained of, and the ordinance could have no bearing on that question. We think it is clear that the court erred in permitting the ordinance to be read in evidence. But while the ordinance was improperly admitted in evidence, we do not think its admission was prejudicial to the rights of appellant. The court, at the request of the respective parties, fully instructed the jury in regard to the law involved in the case, and by the instructions the duty of the jury was so plainly outlined that we do not see how the admission of the ordinance could have misled, and if the error was harmless it is no ground for a reversal of the judgment.

It is also claimed that the court erred in the admission of the evidence of the witnesses Dyer and Eaton, in regard to the condition of the brakes on the street-car, on the ground that their evidence was not confined to the precise time that the accident occurred. The witness Eaton testified that his attention had

been called to the brakes on the car at different times before the accident, and then testified that the brakes were in bad order about the time of the accident. We see no substantial objection to the evidence. As to the evidence of the witness Dyer, he testified that he frequently examined the brakes before the accident, but how long before he could not tell, but that the brakes remained in the same condition all the way down to the time of the accident. We think, under the facts disclosed, the court properly allowed the witness to testify as to the condition of the brakes.

A few other objections are made in the argument of counsel in regard to the ruling of the court on the evidence, ³⁵⁷ but after a careful examination of the record we find no substantial error in the ruling in this regard.

No substantial objection has been pointed out in the argument to the instructions given for the plaintiff, and upon examination we find no substantial objection to them. The court, at the request of defendant, gave thirteen instructions to the jury as asked, except the last one, which was slightly modified. The modification was, however, so slight that it did not make any material change in the instruction. So far as the law involved in the case is concerned, we think the jury were fully and fairly instructed, and appellant has no just ground to complain of the ruling of the court on the instructions.

The judgment of the appellate court will be affirmed.

A MUNICIPAL CORPORATION POSSESSES NO POWERS except those conferred upon it expressly or by fair implication by the law creating it, or statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It cannot do any act, nor make any contract, nor incur any liability, not thus authorized: *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 822.

APPEAL—HARMLESS ERROR.—Error without prejudice is no ground for a reversal of judgment: *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571. It will be disregarded on appeal: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421.

SEAVERNS v. PRESBYTERIAN HOSPITAL.

[173 ILLINOIS, 414.]

CORPORATIONS—CONSTRUCTIVE NOTICE.—If a loan is negotiated with a corporation, the fact that its president is also a member of a partnership through which the loan was negotiated for a third person does not charge the corporation with constructive notice of an arrangement between the borrower and the firm that the firm should pay off prior mortgages out of the money loaned.

CORPORATIONS—NOTICE TO PRESIDENT—EFFECT OF.—Notice to the president of a corporation is not notice to the corporation where the president is acting in his own interests and against those of the corporation. Hence, if he is a member of a firm through which a loan is negotiated with the corporation for a third person, but, nevertheless, in the interest of the firm, the corporation is not chargeable with knowledge possessed by its president, as a member of such firm, which he does not communicate, and which the corporation does not know, of facts derogatory to the title of the property on which the loan is made.

PAYMENT—APPLICATION OF—DUTY—TRUST—AGENCY.—A case in which the owner of property executes a mortgage and gives it to his agents to negotiate a loan and to receive the money is not a case of trust, but one of agency, and the equitable principle that a mortgagee must, under some circumstances, see to the application of the money loaned, does not apply to it, especially where the money is to be applied by the agents to certain purposes requiring, on their part, time, deliberation, and discretion, such as the payment of a particular debt, or debts not ascertained when the money is paid over, or debts to arise in the future.

PAYMENT—APPLICATION OF—MORTGAGEE'S DUTY AS TO.—If the owner of mortgaged property executes a note and mortgage and places the papers in the hands of his agents to negotiate a loan and to apply its proceeds to the payment of the prior mortgages and of debts for improvements not yet completed, the mortgagee is not required to see that the agents apply the money as directed, but he has a right to purchase the prior mortgages, and, if he does so, such purchase is not a satisfaction of them.

Suit to foreclose two mortgages, one of which was given on certain property in the city of Chicago, by Mark S. Thompson, to secure a note for \$10,000, dated March 11, 1882, payable five years after date. The other mortgage was given by Joshua S. Seaverns, who became the owner of the said property on October 2, 1885. The Seaverns mortgage was to secure a note for \$2,000, dated October 2, 1885. This and the Thompson note matured at the same time. The firm of Peabody, Houghteling & Co., became owners of both notes. The Seaverns mortgage was subject to the Thompson mortgage and both were recorded. On July 21, 1894, the two notes were sold to the Presbyterian Hospital, of Chicago, which, on January 25, 1895, filed a bill of foreclosure against Seaverns. Bogue & Hoyt, real estate agents of Chicago, became the agents of Seaverns in 1885,

and remained such until March, 1894, when they failed in business. The firm was composed of George M. Bogue, Hamilton B. Bogue, and one Hoyt. After the death of Hoyt, the firm was known as Bogue & Co. The business of Seaverns was in charge of Hamilton B. Bogue, who collected the rents, paid his interest, and had general charge of his property. An arrangement was made, in 1890, between Seaverns and Bogue & Hoyt, to remodel the warehouse on the property. That firm had entire charge of the improvements. The estimated cost of the repairs, at the commencement, was between \$6,000 and \$7,000, but, when completed, the cost was about \$19,000. Bogue & Hoyt made large advances, for Seaverns' use, during the progress of the work, but more money was necessary to carry on the repairs, and it was agreed that Hamilton B. Bogue should negotiate a loan on the property, for Seaverns, for \$25,000, so that the two mortgages could be paid off, and the balance applied to pay for the repairs. In accordance with this agreement, Seaverns, on March 31, 1891, executed his note for \$25,000, payable to his own order and indorsed by himself, payable five years after date. This note was secured by a new mortgage on the property. At this time George M. Bogue was president of the hospital and George W. Hale was its treasurer. After the above arrangement had been made, Bogue & Hoyt wrote a letter to Hale, on March 31, 1891, in which they stated that they had negotiated a loan to Seaverns, on the property, the details of which would be given when the papers covering the loan were handed over, and requested Hale's check for the amount of the loan, \$25,000. This request and the note were dated March 31, 1891. The treasurer's check was dated April 1, 1891, but the mortgage was not acknowledged until April 6, 1891, when it was sent to the hospital, and the transaction was completed. Seaverns answered, denying any indebtedness on the notes, and claimed that the hospital had notice of the mortgages and of the understanding between Bogue & Co. and himself that they should pay off, out of the proceeds of the new loan, the two mortgages; that it was the duty of the hospital to see to the application of the money toward the payment of the two mortgages sought to be foreclosed; that the purchase, by the hospital, of the two mortgages should be treated as a payment and cancellation thereof; and that they should, therefore, be declared satisfied. After the filing of a replication, the court decreed a foreclosure of the two mortgages, as being first liens on the property. This decree was affirmed in the appellate

court, and Seaverns appealed to the supreme court by prosecuting a writ of error.

Pence & Carpenter, for the appellant.

Green, Robbins & Honore, for the appellee.

419 CRAIG J. 1. Did the defendant in error have actual or constructive notice of the arrangement between Seaverns, the plaintiff in error, and Bogue & Co., that Bogue & Co. should pay off the first mortgages sought to be foreclosed, out of the \$25,000, by reason of George M. Bogue being president of the hospital? The testimony shows that all the arrangements for the making of the \$25,000 loan were between Hamilton B. Bogue and Seaverns. The talk when it is claimed the arrangement was made for paying off these first mortgages out of the \$25,000 loan was between Seaverns and Hamilton B. Bogue. George M. Bogue was not present, and there is no evidence showing he had any knowledge that the money was to be applied to take up the first mortgages until after the payment of the money and the delivery of the mortgage to the defendant in error. Because George M. Bogue was a partner of Hamilton B. Bogue and was the president of the Presbyterian Hospital, therefore plaintiff in error claims defendant in error had constructive notice. Plaintiff in error also claims that any knowledge or information possessed by an agent at the time of acting as agent for a corporation is notice to the corporation, and notice to an executive officer or agent is notice to the corporation itself.

The general proposition is true; but where an officer of a corporation is dealing with the corporation in his own interest, opposed to its interest, he is held not to **420** represent it in the transaction so as to charge it with the knowledge he may possess, but which he has not communicated to it and which it does not otherwise possess, of facts derogatory to the title he conveys: *Commercial Bank v. Cunningham*, 24 Pick. 270; 35 Am. Dec. 322; *Angell & Ames on Corporations*, 308. In *Higgins v. Lanning*, 154 Ill. 301, a corporation making a purchase from its president was held not chargeable with his knowledge of infirmities in his title to the property. In denying notice to the corporation this court said (page 387): "This is upon the view that Higgins, who was at the time the president of the insurance company, was not, in the transfer of the securities to it, its agent; that while, ordinarily, notice to the president of a corporation is also notice to the corporation, such is not the law when the president is dealing with it in his own interest and

against the interest of the corporation; that notice to the corporation through its officer rests upon the presumption that the officer will communicate such notice, but that it cannot be presumed that Higgins, although president of the insurance company, would, in selling these securities to it, make any communication derogatory to them, his title thereto, or their value. We think the rule contended for is supported by sound reason and the authorities as well. In *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33, it was said: "The general proposition is undoubtedly true that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal: Story on Agency, sec. 140. On principles of public policy the knowledge to the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration [the president selling to the company], for in such a transaction the officer, in making the sale and conveyance, stands as a stranger to the company: *Stratton* ⁴²¹ *v. Allen*, 16 N. J. Eq. 229. His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it.'" In the case at bar, Bogue & Co. were dealing with the hospital in their own interest. They were negotiating a loan which subsequent events showed they intended to apply to Seaverns' indebtedness to themselves, for advances made by them. The fact that the \$25,000 mortgage was not a first lien, as required by the by-laws of the hospital, shows that neither George M. Bogue nor Bogue & Co. were looking out for the interests of plaintiff in error, and did not communicate the fact to defendant in error, as that would have prevented the loan from the hospital to Seaverns. Here the president was negotiating the note and mortgage to the defendant in error, and he stands, under the authorities, as a stranger to the hospital, and must be held not to represent it in the transaction so as to charge it with the knowledge which he may have possessed but did not communicate to it, and which it did not know.

2. Was there any legal obligation on the part of defendant in error, when it paid the \$25,000 to Bogue & Co. and received in exchange the \$25,000 note and mortgage, to see to the application of the money in payment of the \$12,000 first mortgages now sought to be foreclosed? Plaintiff in error concedes the va-

lidity of the two mortgages in controversy in the hands of the original mortgagees, or anyone except the defendant in error. It appears from the evidence that Bogue & Hoyt had been the agents of plaintiff in error for many years; had taken full charge of the property since plaintiff in error purchased it; had paid taxes, collected rents, and had charge of remodeling the warehouse thereon. In making the repairs they had advanced large sums of money for plaintiff in error. In order to complete the repairs it became necessary for plaintiff in error to negotiate a ⁴²² loan on the property. Plaintiff in error arranged with Hamilton B. Bogue, of the firm of Bogue & Co., to negotiate a loan and to receive the money. Plaintiff in error claims it was agreed between himself and Hamilton B. Bogue that these two mortgages should be first paid off, the balance to be used in finishing the building. Seaverns executed a note for \$25,000, payable to himself, and indorsed it, the same being secured by a mortgage on the property, and placed it in the hands of his agents, Bogue & Co., to negotiate. Bogue & Co. sold the note and mortgage to the Presbyterian Hospital and received the \$25,000 from its treasurer. The note was sent to the treasurer, and the mortgage also, as soon as recorded. The transaction was completed April 6, 1891. Defendant in error did not own the two mortgages now being foreclosed at that time.

Plaintiff in error attempts to apply the principal in this case that a purchaser or mortgagee dealing with a trustee must, under some circumstances, see to the application of the purchase money. The case at bar is not a case of trust, but one of agency, the owner of property executing a mortgage and giving it to his agents to negotiate the loan and receive the money. The rule in regard to the application of purchase money is applied where the title to property sold or mortgaged is in the trustee and such trustee is the legal owner, while in equity the real owners are the cestuis que trustent, and when one receives a conveyance of this beneficial title, it is his duty to get from the real owner a receipt for the purchase money. Perry on Trusts, section 790, says: "Thus, if an estate is vested in trustees to sell and divide the purchase money between B and C, a court of law treats the trustees as the true owners and their receipts for the purchase money as valid discharges; but courts of equity treat B and C, the cestuis que trust, as the true owners and the trustees as mere instruments. Courts of equity, therefore, require that the receipts for the purchase ⁴²³ money shall be

signed by the rightful owners, or the purchase money must be properly applied to their use according to the terms of the trust, or there can be no such conveyance of the estate as to bar their beneficial interests. . . . Thus, the application of the purchase money, or the power of trustees to sign receipts for it, becomes, in equity, a question of title, or, rather, a question of the equitable title, which is the principal thing, for the legal title without the beneficial use is of little consequence. Thus, the general rule is, that *prima facie* the cestuis que trust must sign receipts for the purchase money, or the purchaser must look to its application." And again, in section 798: "It may be stated that the strict English rule is not favored in American courts, although they apply the doctrine where it cannot be avoided."

In *Duffy v. Calvert*, 6 Gill, 517, the court states the reason of the rule: "In equity the party beneficially entitled to the produce of the estate—that is to say, the cestui que trust of the purchase money—and not the trustee or donee of the power of sale, is considered to be the owner; and on this principle it is that the purchaser is bound, at the hazard of having his money to pay over again, to pay to the cestui que trust or see that it comes to his hands, or, in other words, to see to its application."

In *Story's Equity Jurisprudence*, section 1124, Sir William Grant is quoted as making it "questionable whether the admission of the doctrine is not, in general, productive of more inconvenience than real good, for although in many instances it is of great service to the cestui que trust, as it preserves his property from speculation and other disasters to which, if it were left to the mere discretion of the trustee, it would necessarily be subject, yet, on the other hand, it creates great embarrassments to purchasers in many cases, and especially where, as in cases of infancy, the parties in interest are incapable of giving a valid assent to the receipt and application of the purchase money ⁴²⁴ by the trustee." And Mr. Story, after discussing the rule, says (section 1135): "These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic, and they lead strongly to the conclusion, to which not only eminent jurists but also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser as to its application."

The tendency has been to restrict rather than to enlarge the

application of the rule. In *Whitman v. Fisher*, 74 Ill. 147, where power was given by will to executors to sell real estate to raise funds with which to pay legacies as the legatees became of age, it was held that a sale and conveyance made after one of them arrives at majority will be valid, even though the proceeds are applied in payment of the testator's debts. In regard to the purchaser not being required to see to the proper application of the purchase money, the court said (page 158): "The testator made certain bequests to each of his children, payable, respectively, as they became of age. Power is expressly given to the executors to sell real estate for the purpose of raising funds with which to pay these several legacies. Ogden H. Whitman, one of the beneficiaries under the will, became of age in 1852 and was entitled to the bequest in his favor. The sale to John Fisher was made in the spring of 1854. It does not appear but the exact case had arisen where the executors had the clear right, under the will, to sell real estate independently of the decree of the court. The purchaser was under no obligation to see to the application of the purchase money."

3. The facts in this case preclude the operation of the rule contended for by plaintiff in error, under the law, even if it had been a trust on the part of defendant in error. Story, in his *Equity Jurisprudence*, section 1134, says: "Where the trusts are defined yet the money is ⁴²⁴ not merely to be paid over to third persons, but is to be applied by the trustees to certain purposes which require on their part time, deliberation, and discretion, the purchaser is not bound to see to the due application of the purchase money." Perry on *Trusts*, section 795, gives the following trusts where the purchaser is not subject to the rule: "If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the application of the purchase money; or if the trust is to pay debts and legacies, or to pay a particular debt and all other debts, or to pay legacies, or to pay debts and apply the balance to the support of some one, there can be no obligation to see to the payment of the debts and legacies. . . . If one debt is named but is coupled with others not named, the same considerations apply. In such trusts the testator must be presumed to have intended that his trustees should have the full power to give receipts for the purchase money, in order to apply it to the purposes pointed out." In 2 *Lewin on Trusts*, page 456, it is said: "To the principle under consideration is referable the well-known rule that a purchaser is not bound to see to the application of his money where

the trust is for payment of debts generally, for to ascertain who are the creditors and what is the amount of their respective claims is matter of trust involving long and intricate accounts, and requiring the production of vouchers which the purchaser would have no right to require, and mere absence of statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for the payment of debts. So if the trust be for payment of a particular debt named and the testator's other debts": Citing *Corser v. Cartwright*, L. R. 7 H. L. 731; *Robinson v. Lowater*, 17 Beav. 592. This rule was approved by this court in *Cherry v. Greene*, 115 Ill. 591, as follows (page 597): "We are of opinion, therefore, that Crapo and Clifford, the trustees ⁴²⁶ named in the above-recited instrument, are vested with power to sell the premises in question, nor will a purchaser from them be under obligation to see to the application of the purchase money. Where, as here, the trust is to pay debts generally, and apply the balance to the support of the grantor's family, the purchaser is released from such obligation: *Perry on Trusts*, sec. 795; *Hill on Trustees*, 342." See, also, *Franklin Sav. Bank v. Taylor*, 131 Ill. 376.

When the \$25,000 mortgage was agreed upon in March, 1891, the improvements on the building had not been completed, and the evidence shows they were not completed until in September, 1891. One Schuyler, a witness for plaintiff in error, testified that Hamilton B. Bogue came into his office and he sent for plaintiff in error (Seaverns), and he (Schuyler) then said to Bogue: "This mortgage—this \$25,000 mortgage—if it is given, it is upon the understanding that you pay the first mortgage and that the balance be applied to what is owing you, and to the further betterment and improvement of the property. . . . What was left after the payment of the \$12,000 was to be applied by them upon the indebtedness of Seaverns." Seaverns testified: "The deed was given for the purpose of paying the Peabody loan, and the balance was to pay on the improvements to finish up the building." When he was asked as to the amount it would all be—whether the \$25,000 would be sufficient to take care of the whole thing—he did not think anything was said because the building was not done; that there was some talk about how much it was going to take, and he said the \$25,000 was supposed to be enough to take care of them. The accounts, as appears from the record, show many items paid by his agents,

Bogue & Co., after March 31, 1891—after the execution of the mortgage. This evidence clearly shows that part of the \$25,000 received from the hospital was to be applied to pay a particular debt, and to pay debts not ascertained, when the mortgage ⁴²⁷ loan was made, and also on debts to arise in the future in finishing the building. The finishing and remodeling of the building were under the entire control of Bogue & Co., and they were given a discretion in the matter.

The testimony is conclusive that the hospital is not, under the authorities, subject to the rule which required it to see to the application of the purchase money. The defendant in error, not being legally bound to see to the payment of the mortgages sought to be foreclosed, had a right to purchase them, and such purchase was not a satisfaction of them.

The judgment of the appellate court is affirmed.

CONSTRUCTIVE NOTICE—WHAT IS.—Knowledge of facts sufficient to put a prudent man on inquiry as to the existence of other facts is equivalent to actual knowledge of those facts which such inquiry may, in all probability, disclose, if it is properly pursued: *Doran v. Dazey*, 5 N. Dak. 167; 57 Am. St. Rep. 550, and note.

CORPORATIONS—NOTICE TO OFFICER—EFFECT OF.—A corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129; 55 Am. St. Rep. 118, and note. Knowledge obtained by a corporate agent is not imputed to the corporation, unless it acts through such agent in a matter in which the information possessed by him is pertinent: *Note to Bank v. Sneed*, 56 Am. St. Rep. 795. Notice to a director is not notice to a corporation: *Bard v. Penn etc. Fire Ins. Co.*, 153 Pa. St. 257; 34 Am. St. Rep. 704. Compare *Bank v. Sneed*, 97 Tenn. 120; 56 Am. St. Rep. 788.

STEWART v. PEOPLE.

[173 ILLINOIS, 464.]

LARCENY—VOLUNTARILY PARTING WITH PROPERTY IS NOT.—The crime of larceny always includes the taking and conversion of property without consent of the owner. Hence, there can be no larceny if the owner voluntarily parts with the possession and title of property.

LARCENY—VOLUNTARILY PARTING WITH DRAFT—FRAUDULENT REPRESENTATIONS.—Inducing the owner of a draft, by fraudulent and unfair representations, to voluntarily part with its possession and title, is not larceny.

Arnold Tripp, for the appellant.

Edward C. Akin, attorney general, Charles S. Deneen, state's attorney, Harry Olson, assistant, C. A. Hill, and B. D. Monroe, for the people.

⁴⁰⁷ CARTWRIGHT, J. Plaintiff in error was convicted in the criminal court of Cook county of the larceny of a draft for \$50 from Herman Klepstein, and was sentenced to imprisonment in the penitentiary. Defendant was a doctor, occupying an office in the Lakeside Building, in Chicago. Herman Klepstein resided near Groton, South Dakota. He came to Chicago December 29, 1897, with a carload of stock, arriving at the Union Stock Yards at 4 o'clock in the morning. He delivered his stock and then fell in with one Timothy Englehard, who was in the habit of bringing patients to defendant and receiving some compensation for doing so. Englehard took Klepstein to a store and persuaded him to be measured for a suit of clothes, and then treated him to a glass of beer, after which they went down town on a street-car. On the way Englehard asked Klepstein what was the matter with him, and said that he looked sick, to which Klepstein replied that he was not sick. When they got down town Englehard assisted in getting Klepstein's pass extended, and said that he had to go to defendant's office to get some medicine for his baby. He ⁴⁰⁸ persuaded Klepstein to go into the office, and spoke to defendant about medicine for his baby, and then introduced Klepstein and said that he looked sick—that his eyes looked bad. The evidence for the people upon which defendant was convicted was substantially as follows: After the introduction, defendant told Klepstein that he looked sick, and he replied that he was not sick. Defendant said that he was a professor and could tell when people were sick, but could not tell what was the matter until he made an examination. He and Englehard told Klepstein to pull off his overcoat, and Klepstein threw his shoulders back and they took it off. Then they told him to take off his other coat and vest and pull down his suspenders, and he did so. Englehard then went out of that room, and defendant pulled Klepstein's shirt up around his neck. Klepstein laid down on the examination chair, and defendant made a physical examination, and told him that he had heart disease, brain trouble, and piles. After the examination Klepstein got up and put on his clothes and was going away, but defendant said that he could not go until this was settled for—that the treatment had already begun and would have to be settled for. Defendant then called Englehard back into the office and said that he and Klepstein had decided on everything but the amount; that he wanted one hundred and fifty dollars to treat him, one-half in cash, and that he would take a note for the rest. Klepstein said that that was more money

than he had; that he only had a little money—a fifty-dollar draft. Defendant asked to see the draft and Klepstein took it out. Defendant looked at it and said that was all right, and asked him to indorse it, which he did. Defendant took the draft and filled out a note for one hundred and fifty dollars, payable in sixty days, and indorsed the amount of the draft, fifty dollars, as a payment on it. Klepstein signed the note and defendant took it and the draft. Defendant then wrote a prescription and they all went down to a drugstore, where the defendant handed the prescription to a clerk to be filed for ⁴⁶⁹ Klepstein. The prescription was filled and the package was handed to Klepstein, who paid the charge of three dollars and seventy-five cents for it. Defendant went out, and Klepstein complained to Englehard, saying that he was not sick and did not need the medicine. Englehard said that he was sorry that he thought as he did, and proposed to go back to the doctor's office and see if they could get the draft back. They went to the office, and Klepstein said that he was not sick, and would give defendant twenty-five dollars if he would give the note and draft back. The defendant was going out to lunch and said he had no time, and the parties all took lunch together at a restaurant. Defendant left the restaurant first, and after he left Englehard proposed to go back to defendant's office and see if they could not get the draft back. They went back again, but defendant refused to give back the draft. The next day Klepstein went again with a friend and asked for the note and draft, and offered to give defendant twenty-five dollars if he would return them. He refused, but gave him the note back, tearing off the signature and keeping the draft. Klepstein was examined ten days later by another physician, who did not find him afflicted with the diseases defendant claimed existed. A thorough examination developed nothing of any consequence in the way of disease, but, on the whole, the man was in good condition and health.

Defendant testified that the contract was entered into voluntarily. The evidence as to the character of defendant, and his reputation for honesty and fair dealing as well as veracity, was conflicting. A clerk in the drugstore testified that Klepstein told him about the arrangement for treatment with the doctor, but said that he was afraid the doctor would not cure him, and that his wife would not be pleased when he got home. Klepstein admitted that at the time of the examination he told defendant that he would deposit two hundred dollars if he would make him as strong and healthy as he was when he was seventeen years old, but defendant said that he could not do that.

⁴⁷⁰ The crime of larceny always includes the taking and conversion of property without consent of the owner. It involves a trespass, and there can be no larceny where there is a consent to the taking of the property with the intention that the possession and title shall pass. Where the owner voluntarily parts with the possession and title, the crime of larceny is not committed. If defendant, by fraudulent and unfair statements and representations, induced Klepstein to voluntarily part with the possession and title of the draft, intending to transfer such possession and title to him, there could be no larceny, no matter what else it might be: *Welsh v. People*, 17 Ill. 339; *Stinson v. People*, 43 Ill. 397; *Johnson v. People*, 113 Ill. 99. There is no doubt that such was the fact, and that Klepstein meant to part with the draft absolutely and to transfer the title to defendant. The only claim made on behalf of the people is, that the draft was obtained by force and duress. But the evidence does not sustain this claim. Klepstein indorsed the draft after the examination and after his clothes were on and his supposed friend, Englehard, had come back into the office. There was no physical force whatever, and no show of any. Klepstein testified that he was scared, but it is plain that he had no reference to duress, physical force, or threats of violence. The methods employed were disreputable, and Klepstein was overpersuaded and induced to do what he would not have otherwise done, but it was not from any restraint or apprehension of violence. They told him that he was sick, and although he said that he was not, yet he aided in taking off his overcoat and took off his other clothing himself and voluntarily submitted to the examination. After the prescription was written he accompanied defendant to the drugstore, where the prescription was filled and he paid for it. The only thing that is called a threat is that defendant said that he must settle for what had been done, but he made no attempt to leave the office, and there was no threat of ⁴⁷¹ bodily harm or injury and no compulsion or restraint of his liberty. He told the clerk at the drugstore of the contract between him and the doctor, and his only fear then was that the doctor would not carry out his agreement, and that his wife would be displeased. The evidence did not establish the crime of larceny.

The judgment is reversed and the case is remanded.

LARCENY—TAKING WITH OWNER'S CONSENT—FALSE PRETENSES.—If the owner of property voluntarily parts with the possession and title neither the taking nor the conversion is felonious: *Note to State v. Homes*, 57 Am. Dec. 272; *note to Grunson v.*

State, 46 Am. Rep. 185. Contra, that the subsequent conversion is larceny if the intent to steal existed: State v. Lindenthall, 5 Rich. 237; 57 Am. Dec. 743, and note; Dignowitty v. State, 17 Tex. 521; 67 Am. Dec. 670. To constitute larceny there must be a trespass, that is, a taking of property without the consent of the owner, coupled with an intent to steal the property so taken; and the crime is not committed when, with the consent of the owner, his property is taken, however guilty may be the taker's purpose and intent: Connor v. People, 18 Colo. 373; 36 Am. St. Rep. 295. But if one obtains possession of property by fraud, it has the same effect as obtaining possession by a trespass; Commonwealth v. Flynn, 167 Mass. 460; 57 Am. St. Rep. 472, and note showing that one who obtains the goods or money of another by some fraudulent trick or artifice, and carries them away, is guilty of larceny: See, also, to same effect, State v. Woodruff, 47 Kan. 151; 27 Am. St. Rep. 285, and note. There is, however, a distinction between obtaining money by false pretenses and larceny by trick: See note to Grunson v. State, 46 Am. Rep. 185, as, in the former case, the owner intends to part with his title.

ROCK ISLAND NATIONAL BANK v. THOMPSON.

[173 ILLINOIS, 593.]

JUDGMENT, FEDERAL—LIEN—FEDERAL LAW.—THE TERRITORIAL EXTENT of the lien of a federal judgment is a question of federal law.

JUDGMENT, FEDERAL—LIEN—TERRITORIAL EXTENT OF.—The lien of a judgment of a federal court is coextensive with the territorial jurisdiction of the court which pronounced such judgment, and is not confined to the county in which the court sat when it rendered judgment, although, under the state law, a judgment may be a lien only in the county in which it was entered.

JUDGMENT, FEDERAL—LIEN—RETROACTIVE STATUTE—FAILURE TO FILE TRANSCRIPT, EFFECT OF.—A statute requiring a transcript of a judgment rendered in one county to be filed with the clerk of another county before the judgment shall create a lien on the debtor's real estate in the latter county is not retroactive in its operation, and a federal judgment rendered prior to the enactment of such a statute is a lien upon the defendant's real estate situated in any county within the territorial jurisdiction of the federal court, although no transcript of the judgment was filed in such county.

EXECUTION—ISSUANCE OF, ON FEDERAL JUDGMENT—STATE LIMITATION AS TO TIME—WRIT OF ERROR.—A state statute providing that the time during which the owner of a judgment is restrained by injunction or appeal from obtaining execution shall not be considered as a part of the statutory time in which he must take out execution for the preservation of his lien, applies also to a writ of error sued out from a federal court, where it has been made a supersedeas.

EXECUTION—ISSUANCE OF, ON FEDERAL JUDGMENT—WHEN TIME BEGINS TO RUN—FILING OF MANDATE.—The statutory time, fixed by state laws, within which execution must issue to preserve the lien of a judgment does not begin to run, in a case where the owner of a judgment rendered in a federal

court is prevented from taking out execution by a writ of error sued out from the supreme court of the United States, and which is made a supersedeas, until the mandate affirming the judgment is filed in the lower court.

PLEADING—FORECLOSURE OF MORTGAGE—PRIOR LIEN—FEDERAL JUDGMENT—NECESSITY OF CROSS-BILL. In a proceeding to foreclose a mortgage, where the plaintiff alleges that the defendant has or claims some interest in the mortgaged property, and the answer alleges that such interest is a prior lien, the court may, without the filing of a cross-bill, decree a foreclosure of the mortgage and order the claim of the defendant, such as a federal judgment, to be paid as a prior lien, especially where the plaintiff prays that the property be sold and the proceeds distributed according to law.

Sweeney & Walker, for the appellants.

Peck, Miller & Starr, for the appellees.

597 PER CURIAM. The decree of the circuit court was, on appeal, affirmed by the appellate court for the second district, and the said appellate court, by Mr. Justice Dibell, delivered the following opinion:

"On March 31, 1888, Thompson and Root recovered a judgment against the J. S. Keator Lumber Company in the circuit court of the United States for the northern district of Illinois. On April 21, 1888, defendant therein sued out from the supreme court of the United States a writ of error to review said judgment and took certain steps to cause said writ of error to be made a supersedeas. Such judgment was affirmed by the supreme court of the United States on April 4, 1892, and execution and alias execution were issued as hereinafter stated. Two days after the affirmance of said judgment appellants filed for record in Rock Island county a mortgage from the said Keator Lumber Company upon real estate in said county which said Keator Lumber Company had owned on March 31, 1888, and ever since that date, which mortgage was given to secure debts due appellants. Sixteen days after the mortgage was recorded this suit was begun by filing in the circuit court of Rock Island county a bill to foreclose said mortgage. By amendment Thompson and Root were made defendants. They answered, claiming their judgment was a first lien. Upon final hearing the court decreed the foreclosure of said mortgage, but found such judgment a prior lien upon said real estate, and directed that it be first paid out of the proceeds of the sale of the mortgaged property. The mortgagees prosecute this appeal from said decree.

"The circuit court of the United States, when it rendered

said judgment, was sitting in Cook county. This real estate is in Rock Island county. The first question presented for decision is, whether said judgment ever became a lien upon said real estate. Appellants earnestly contend that it only became a lien upon real estate in Cook county, where said court sat when it rendered judgment. ⁵⁹⁸ Appellees claim it became a lien on all real estate of the Keator Lumber Company within the northern district of Illinois, which includes Rock Island county.

"The legislation affecting this subject which was in force when this judgment was rendered is as follows:

" 'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding': U. S. Rev. Stats., sec. 914.

" 'A party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such district or circuit courts; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments as aforesaid, by execution or otherwise': U. S. Rev. Stats., sec. 916.

" 'That a judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained, situated within the county for which the court is held, from the time the same is rendered or revived for the period of seven years, and no longer; provided, that there shall be no priority of the lien of one judgment over that of another rendered at the same term of court or on the same day in vacation. When execution is not issued on a judgment within one year from the time the same becomes a lien it shall thereafter cease to be a lien; but ⁵⁹⁹ execution may issue on such judgment at any time within said seven years, and shall become a lien on such real estate from the time it shall be delivered to the sheriff or other proper officer to be executed': Rev. Stats. 1874, c. 77, sec. 1.

" 'When the party in whose favor a judgment is rendered is

restrained by injunction out of chancery, or by appeal, or by the order of a judge or court, or is delayed on account of the death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned in sections 1 or 6 of this act': Rev. Stats. 1874, c. 77, sec. 2.

"That Congress has power to pass all necessary laws to carry into execution judgments rendered by the courts of the United States, and that it may make them liens upon property of the debtor, whether such property is or is not subject to the lien of judgments under the laws of the state where the property is situated, though denied by *Reid v. House*, 2 *Humph.* 576, must be regarded as settled by *Wayman v. Southard*, 10 *Wheat.* 1, and *Bank of United States v. Halstead*, 10 *Wheat.* 51, and other decisions of the supreme court of the United States. In any case the only question can be, How far has Congress exercised this power? We also consider it too obvious for extended argument that while the supreme court of this state is the final tribunal for the determination of the true construction of the state statute above quoted, as applied to the lien of judgments rendered by the courts of this state, yet when the question arises, what is the meaning of the said federal statute, and to what extent the liens of judgments rendered in the courts of the United States within this state are governed by said state statute, and whether the language of the state statute is to be applied literally and with strictness to judgments of the courts of the United States, upon such questions the courts of the United States are the final arbiters. The question, What is the lien of a federal judgment? is a question of federal law, to be conclusively ⁶⁰⁰ settled by the construction adopted by the highest federal tribunal. To what extent courts of the United States held within this state are bound by our state statutes upon practice, pleadings, and modes of procedure is a question of federal law, upon which the conclusions of the supreme court of the United States are final. That court has not adopted a literal construction of the provisions in question. It has been held by the supreme court of the United States that the words 'as near as may be,' in said section 914 above quoted, do not mean as near as may be possible, nor as near as may be practicable. That court said in *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291, that this provision 'devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such

state statute which, in their judgment, would unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals. While the act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory.' Accordingly there it was there held that many statutory provisions as to practice in state courts are not binding and compulsory upon the courts of the United States within such state. To the same effect is *Phelps v. Oaks*, 117 U. S. 236, and other cases.

"A circuit court of this state has jurisdiction only within the county in which it is held, and when our state statute made its judgment a lien on real estate 'situated within the county for which the court is held,' it made the judgment territorially co-extensive with the jurisdiction of the court which rendered it. In the application of this language to the lien of a judgment rendered by the circuit court of the United States having jurisdiction over the entire northern half of this state, the question whether the letter or the spirit of this statute is to fix the extent of the lien of such judgment is not a question of interpretation of our statute law, but of the extent to ⁶⁰¹ which it was adopted for the federal courts by the federal statute quoted, and that is a federal question to be settled by the courts of the United States.

"This question was considered by the supreme court of the United States in *Massingill v. Downs*, 7 How. 760, and that court reached the following conclusions: 'The circuit courts of the United States exercise jurisdiction coextensive with their respective districts. It has never been supposed that by the process of the 19th of May, 1828, which adopted the process and modes of proceeding of state courts, the jurisdiction of the circuit courts was restricted. The "process and modes of proceeding" in the state were adopted by Congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting the jurisdiction of these courts. In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of the process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suit-

ors in the state courts in a much better condition than in the federal courts.' In *Williams v. Benedict*, 8 How. 107, that court said: 'The process, both mesne and final, in district and circuit courts of the United States being conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends also upon the state law, where Congress has not legislated on the subject. In some of the statutes a judgment is not a lien on land; in others there is a lien coextensive with the jurisdiction of the court.' In *Brown v. Pierce*, 7 Wall. 205, 217, it was said: 'Congress, ⁶⁰² in adopting the processes of the states, also adopted the modes of process prevailing at that date in the courts of the several states in respect to the lien of judgments within the limit of their respective jurisdictions.'

"Many of the federal circuit and district courts have had this question before them. In *Cropsey v. Crandall*, 2 Blatchf. 341, it was held by Nelson, judge of the United States supreme court sitting upon the circuit, that a judgment or money decree docketed in a court of the United States for the southern district of New York was a lien upon the lands of the defendant in whatever county of the district they were situated, notwithstanding noncompliance with a state law making it necessary to the creation of a judgment lien upon land in any county that a transcript of the judgment should be filed in the office of the clerk of that county. In *United States v. Scott*, 3 Woods, 334, decided by Bradley, judge of the United States supreme court sitting upon the circuit, it was argued that a judgment rendered by the United States circuit court for the western district of Texas was not a lien till recorded in the county where the lands were, but the court held 'the judgment is a lien upon all lands in the district within the jurisdiction of the court and within reach of its process.' The headnote to *Carroll v. Watkins*, 1 Abb. (U. S.) 474, decided in the United States district court for the southern district of Mississippi, is as follows: 'A state statute requiring judgments to be enrolled in the county in which the lands to be affected lie, before they can become liens on real property, has no effect upon the lien of a judgment of a court of the United States. Such judgment becomes a lien on lands throughout the district in which it is recovered.' In *Shrew v. Jones*, 2 McLean, 78, McLean, judge of the United States supreme court sitting upon the circuit, said: 'The law of Indiana regulating judgments and executions, as it stood in 1828, is the law of Congress by adoption. Effect must be given to the provisions of this law, so far,

at least, as they are ⁶⁰³ adapted to the organization and powers of this court. If the rules of proceeding of the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of those courts. The limits of the state in the exercise of the jurisdiction of this court is as the limits of a county to the local court.' 'The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction.' *Barth v. Makeever*, 4 Biss. 208, assumes a judgment by the circuit court of the United States for the district of Indiana was a lien upon all the lands of the judgment debtor in that state. The circuit court of the United States for the northern district of Ohio, in *Ludlow v. Clinton Line R. R. Co.*, 1 Flip. 25, stated the law thus: 'The limits of a federal judicial district, in the exercise of the jurisdiction of the United States circuit court, is as the limits of the county to the local courts. . . . The lien, therefore, of a judgment rendered in this court has the same effect and operates to the same extent upon the debtor's land throughout the Northern district of Ohio as the lien of a like judgment rendered in the state courts operates on a debtor's land in a county.' The opinion of Caldwell, J., in *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546, holds that prior to the act of Congress of August 1, 1888, hereinafter stated, the lien of judgments of the federal courts was 'coextensive with the jurisdiction of the courts.' He points out the hardships which led Congress to pass the act just referred to, and in so doing speaks of 'the all-prevailing lien of a judgment in a federal court,' and how buyers 'lost their lands by reason of the lien of judgments in federal courts held in some other county.' He also holds that where the states have not provided for docketing federal judgments under said act of Congress of August 1, 1888, 'in such states the lien of a judgment of a federal court continues to be coextensive with its territorial jurisdiction.' The opinion ⁶⁰⁴ of Judge Drummond in *United States v. Duncan*, 12 Ill. 523, in the circuit court of the United States for this district, assumes the lien of such a judgment extended throughout the state. There are other like decisions by other federal courts, and none to the contrary, so far as we are advised.

"It is, therefore, the doctrine of the federal courts, passing upon a subject wholly within their judicial domain, that in construing and applying said act of Congress it is not to be held a literal adoption of the state statutes to govern the lien of fed-

eral judgments, but that the fact is to be considered that the jurisdiction of each federal court extends over a much larger territory than any one state court of general jurisdiction, and includes the territory of many such state courts; that where the spirit and effect of the state law is to make the lien of the judgments of each state court of general jurisdiction coextensive with the territory over which it has jurisdiction, the act of Congress will be held to have adopted said state law in such spirit and effect, and that, as the effect of such act of Congress so adopting such state law, the lien of the judgments of each federal court in said state will extend throughout the territory within the jurisdiction of such federal court.

"This question has been considered and a like view adopted by state courts: *Dermott v. Carter*, 109 Mo. 21; *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338; *Branch v. Lowery*, 31 Tex. 96; *Sellers v. Corwin*, 5 Ohio, 399; 24 Am. Dec. 301. There are like decisions by other state courts outside of Illinois. Some states have held a contrary doctrine: *Hall v. Green*, 60 Miss. 47; *Reid v. House*, 2 Humph. 576. There has been similar judicial reasoning by the supreme court of this state: *Bus-tard v. Morrison*, 1 Scam. 235; *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275. *Jones v. Guthrie*, 23 Ill. 421 (ejectment), was decided upon the assumption that a judgment rendered by the United States circuit court for the district of Illinois (when the whole state was in one district) was a ⁶⁰⁵ lien from the end of the term on lands in Schuyler county, where we judicially know it did not sit. In *Tenney v. Hemenway*, 53 Ill. 97, the opinion of the court assumes that certain judgments rendered by the circuit court of the United States for the northern district of Illinois were liens upon real estate of the judgment defendant in Lee county. The text-books are to the same effect: 1 Black on Judgments, sec. 415; Freeman on Judgments, sec. 405.

"It is worthy of note here that our statute does not say a judgment shall be a lien on lands within the county in which the court is held, but 'within the county for which the court is held'; and while our state courts of general jurisdiction for the county are held exclusively in the county, the circuit court of the United States for the northern district of Illinois is held for the county of Rock Island just as truly as it is for the county of Cook, where the court sits. There are many cases where a strict application of our statutes relating to practice and modes of proceeding in civil cases would restrict the jurisdiction of

the courts of the United States to the counties in which they are held. Section 2 of our practice act says it shall not be lawful to sue any defendant out of the county where he resides or may be found. Ejectment must be brought in the county where the land lies. So of scire facias to foreclose a mortgage (Rev. Stats. 1874, c. 95, sec. 17), which is governed by the practice in courts of law. An execution must issue to the sheriff of the county where the land lies on which a levy is sought, while federal courts have no county officer answering thereto. In each of these cases the word 'county' must be applied to federal courts in the sense of 'the territory within the jurisdiction of the court,' or the greater part of the state is beyond the reach of the federal courts—a result Congress never intended.

"We therefore hold that when judgment was recovered on March 31, 1888, by Thompson and Root against the Keator Lumber Company, in the United States circuit ⁶⁰⁸ court for the northern district of Illinois, sitting in Cook county, it became a lien upon the lands of the defendant in Rock Island county within said district.

"On August 1, 1888, Congress passed an act to regulate the liens of judgments and decrees of courts of the United States: 25 U. S. Stats. at Large, 357. It provided that such judgments and decrees rendered within any state shall be liens on property throughout such state, in the same manner and to the same extent, and under the same conditions only, as if rendered by a court of general jurisdiction of such state, and that whenever the laws of such state require the judgments or decrees of a state court to be registered, docketed, etc., in a particular manner or in a certain office or county before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be so registered, docketed, etc. In 1889 the legislature of Illinois amended section 1 of chapter 77 of our statutes so as to provide for filing in the office of the clerk of any court of record in this state a transcript of any judgment or decree rendered in any other county in this state, and making it a lien thereafter upon real estate in the county where so recorded, with like force and effect as in the county where the said judgment was rendered; and also passed an act (Laws 1889, p. 197) providing judgments and decrees of courts of the United States held within this state may be registered, docketed, etc., in the public offices of this state, so as to con-

form to requirements relating to judgments and decrees of courts of this state.

"It is claimed that in order to continue the lien in force upon the land here in question, it was necessary Thompson and Root should file a transcript of the judgment in the office of the clerk of a court of record in Rock Island county, and that for failure to do so they lost their judgment lien. We do not concur in this proposition. There is nothing in either of said statutes indicating they were ⁶⁰⁷ intended to have a retroactive operation, or were to apply to judgments which had already become liens upon real estate under prior laws. The language all refers to the future. Retrospective laws are not looked upon with favor. Statutes are usually construed as operating on cases which come into existence after the statutes are passed, unless a retrospective effect is clearly intended: Endlich on Interpretation of Statutes, secs. 271, 273, 275, 276; Betts v. Bond, Breese, 287; Thompson v. Alexander, 11 Ill. 54; In re Tuller, 79 Ill. 99; 22 Am. Rep. 164. If these statutes are to be treated as retroactive because they relate to the remedy, their provisions for retroactive operation are void because they give the holders of federal judgments theretofore rendered no reasonable time in which to preserve their lien theretofore acquired upon lands in counties other than that in which the judgment was rendered, by procuring and filing transcripts of such judgments: Dobbins v. First Nat. Bank, 112 Ill. 553; Pearce v. Patton, 7 B. Mon. 162; 45 Am. Dec. 61; Berry v. Ransdall, 4 Met. (Ky.) 292; King v. Belcher, 30 S. C. 381; Gunn v. Barry, 15 Wall. 610; Edwards v. Kearzey, 96 U. S. 595. According to the position here contended for by appellants, upon the taking effect of these laws the lien of federal judgments on lands within the jurisdiction of the court, but outside the county where the court sat, was instantly destroyed, unless the plaintiff had foreseen the legislation and obtained and filed transcripts before said legislation went into effect. If such lien ceased when these laws went into operation, then, before a new lien could be acquired by filing transcripts, subsequent judgments of state courts in the county and later encumbrances would in many cases intervene to destroy the value of the lien. We are of opinion an act framed for the purpose of accomplishing such a result could not be supported as to its retroactive features. The twenty-three days between June 3, 1889, when our statute for docketing judgments in foreign counties was approved, and July 1, 1889, when it went into effect, was not a reasonable time ⁶⁰⁸ for plaintiffs

in all federal judgments at that time liens on real estate outside the county where the court was held to learn of the new act and procure and file transcripts of such judgments in all counties where they wished to preserve the judgment liens they had already secured under prior laws. We hold that the lien of the judgment of Thompson and Root, having attached to these lands on March 31, 1888, was not defeated by the laws referred to.

"The Revised Statutes of the United States in force in 1888 provided as follows:

"Sec. 1007. In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court; and in such cases, where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days.'

"The record before us discloses that, acting in compliance with this statute, the Keator Lumber Company sued out a writ of error to review this judgment, lodged a copy thereof for Thompson and Root in the office of the clerk of the court where the record remained, and obtained and served a citation to Thompson and Root, and also filed a supersedeas bond approved by Judge Gresham, of that court. All this was done on April 21, 1888. The case was one where a writ of error could be a supersedeas, and therefore, under said section 1007, execution could not issue until the expiration of ten days from March 31, 1888, or till April 11, 1888. The writ of error became a supersedeas ^{was} on April 21st—ten days later. The effect thereof was to stay further proceedings to enforce the judgment, and that followed as a matter of right: *Kitchen v. Randolph*, 93 U. S. 86. The writ of error in this case purports to be an order of the acting chief justice of the United States supreme court, attested by the clerk of said circuit court, under the seal thereof. The citation is signed by Judge Gresham, of said circuit court. The supersedeas bond has indorsed upon it an order of approval by Judge Gresham. By the legal effect of

these acts and order of the judges and court in issuing a writ of error and a citation and approving a supersedeas bond, Thompson and Root were restrained from obtaining an execution on said judgment.

"Appellants claim section 2 of chapter 77 of our Revised Statutes does not apply to a writ of error, but only to restraint by injunction or appeal. The effect of this position, if sustained, would be that if a defendant, immediately after judgment is rendered against him in a federal court, sues out a writ of error and takes the steps required to make it a supersedeas, and if the higher court detains the case a year, so that plaintiff cannot obtain an execution within a year after the date of the judgment, then the lien of the judgment on real estate must be irretrievably lost. We are of opinion our statute has not made it possible for the defendant to defeat the lien of a judgment against him by his own subsequent act, and that this case is brought within the spirit and even the letter of said section 2. Therefore, the time Thompson and Root were so restrained is not to be considered as any part of the year mentioned in said section 1 of chapter 77 within which execution must issue on a judgment or the judgment shall thereafter cease to be a lien. It is well settled that after said writ of error was made a supersedeas plaintiff could not take out an execution till the mandate of the supreme court was filed in the clerk's office, after the affirmance of the judgment.

610 "We are cited to cases where it has been held that if the clerk of the court issues execution after affirmance and before mandate is filed, and there is a levy upon and sale of real estate and deed thereunder, though the execution and levy are irregular and must be quashed on motion, yet they are not absolutely void, and if not attacked in proper time may form the basis of a good title. This doctrine is not applicable here. The running of the year having been suspended by the action of the Keator Lumber Company (under whom appellants claim by a subsequent mortgage and by whose prior acts appellants are bound), it did not again begin to run till Thompson and Root were in a position where they could compel the issuance of a valid and regular execution. That the clerk, if he had been willing, could have sooner issued a voidable execution, subject to be quashed on motion, is immaterial. The judgment was affirmed by the supreme court of the United States on April 4, 1892. The mandate issued by the clerk of the supreme court is dated May 18, 1892, and was filed with the clerk of the circuit

court May 23, 1892, and on that day execution was sued out by Thompson and Root and issued by the clerk. This execution was lost. On April 12, 1893, this fact was shown to the said circuit court, and an order obtained for an alias execution, and the same was issued and placed in the hands of the marshal on that day. The proof made to obtain the said order for the alias execution tended to show the original execution never reached the marshal. If the time when the year again began to run was May 23, 1892, when the mandate from the supreme court reached the clerk's office, then the alias execution was issued and placed in the hands of the marshal ten months and twenty-nine days after the judgment was rendered (excluding the time plaintiffs were restrained from issuing execution), and the lien of the judgment upon the lands in question was preserved for seven years (excluding the time of said restraint), and said seven years has ⁶¹¹ not yet expired, and said judgment is still a lien. If, however, the restraint ceased and the year again began to run the day the supreme court affirmed the judgment, and if the lost execution is not to be considered because not shown to have been delivered to the marshal, then the alias execution did not issue till eighteen days after the year expired. We are of opinion the year did not begin to run when the judgment of the supreme court was pronounced: Rev. Stats. 1874, c. 110, sec. 82; *Smith v. Stevens*, 133 Ill. 183. It is the filing of the mandate of the reviewing tribunal in the lower court that reinvests it with jurisdiction, and no mandate issues from the supreme court of the United States without an order of the court, and these orders are made just before the February recess and just before the adjournment of the term in May. No order for mandate will be made at any other time, except upon special circumstances shown: 2 *Foster's Federal Practice*, sec. 495. It does not appear Thompson and Root could have made an effective special showing. They waited for the general order, and this mandate was issued immediately upon adjournment of said court and in compliance with the custom which prevailed. It reached plaintiffs' counsel in Chicago by due course of mail on May 23, 1892, and was on the same day filed with the clerk of the court.

"We are of opinion plaintiffs exercised all reasonable diligence in securing and filing said mandate, and that the year did not again begin to run till the same was so filed. Therefore Thompson and Root preserved their lien for seven years from the date of the judgment (excluding the time of said restraint), and they

still have a judgment lien on said lands as of March 31, 1888, and prior to that of appellants' mortgage.

"Appellants assert that in the absence of a cross-bill it was error to give effect to the prior lien of Thompson and Root by decreeing that their judgment be first paid out of the proceeds of the foreclosure sale. This position ⁶¹² ignores the state of the pleadings. The allegation of the second amended bill as to Thompson and Root was, that they have or claim some interest in said mortgage premises as purchasers, mortgagees, judgment creditors, or otherwise, which liens, if any, have accrued subsequent to the lien of appellants' mortgage, and are subject, in every respect, to the lien thereof. Thompson and Root answered, asserting a prior lien. Said second amended bill prayed a sale of the real estate to satisfy the amount due appellants, and 'that upon said sale being made the money arising therefrom shall be brought into this court, to be distributed among the parties hereto as shall be according to law.' Having prayed a sale of the real estate without asking that such sale be subject to prior liens, appellants cannot complain that the court sold the land as asked. Thompson and Root were parties to said bill, and therefore the prayer that the moneys arising from said sale 'be distributed among the parties hereto as shall be according to law,' included Thompson and Root. It was according to law that the liens on said premises should be paid, in the order of their priority, out of the proceeds of the sale thereof, and the decree was strictly in accordance with, and supported by, the prayer of the second amended bill. If the prayer of the bill had not been as above set out, the action of the court is sustained by *Dillman v. Will County Nat. Bank*, 36 Ill. App. 272; 138 Ill. 282. The very object of making the owners of this prior judgment defendants to the bill was to litigate and settle, and, if possible, defeat, their claim to priority. The court decided the case presented, and, having the parties before it, properly granted complete relief and disposed of the entire controversy."

We are satisfied with the decision reached by the appellate court and the reasons given therefor in the foregoing opinion, which we here adopt. The judgment of the appellate court is affirmed.

FEDERAL JUDGMENTS—LIEN OF—RECORDING.—Judgments of the United States courts are liens on any lands of defendant situate within the district over which the court has jurisdiction; and state statutes requiring judgments to be recorded in the county in which the land lies have no effect upon the lien of a

judgment of a United States court: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334.

LIEN OF FEDERAL JUDGMENT—TERRITORIAL EXTENT OF.—The lien of a judgment in a federal court is, by analogy to state laws, coextensive with the territorial jurisdiction of the court: *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338. The lien of a judgment of a circuit court of the United States extends throughout the state, and is not confined to the county in which the court is situated: *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271. The lien of such a judgment throughout a state does not depend upon the adoption by Congress of the state law, but it exists prior to, and independent of, such adoption: *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271. Compare *Sellers v. Corwin*, 5 Ohio. 398; 24 Am. Dec. 301, as to adoption of state laws.

JUDGMENT LIENS—FEDERAL AND STATE COURTS—CONFLICT.—The judgment of a United States court is as much a lien as a judgment of a state court, and is not divested by a sale under a judgment of a junior date entered in a state court, though the latter is first levied: *Andrews v. Doe*, 6 How. 554; 38 Am. Dec. 450.

CASES
IN THE
SUPREME COURT
OF
IOWA.

RABBITT v. WILCOXEN.

[103 IOWA, 35.]

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWALS—INSOLVENCY.—A by-law of a building and loan association which provides that any stockholder, after giving thirty days' notice, may withdraw the full amount of his payments to the loan fund, with earnings up to the last dividend period, withdrawals to be paid according to priority of notice, and the association not to be liable to pay out on account of withdrawals during any month more than thirty per cent of the cash receipts of the loan fund for that month, contemplates a going concern, and, in case of the insolvency of the association, the fact of notice of withdrawal given by a shareholder before the appointment of a receiver, but after such thirty per cent has been paid out, does not make his claim a preferred claim, nor give him any priority over other shareholders who have not given notice of withdrawal.

W. Wilcoxen, Bishop, Bowen & Fleming, and Sammis & Scott, for the appellant.

Searle & Keating, Dudley & Coffin, E. T. Morris, C. A. Ballreich, Read & Read, Ayres, Woodin & Ayres, and J. K. Macomber, for the intervenors and appellees.

³⁸ **GRANGER, J.** The case involves no controversy as to general creditors, nor as to any creditors except in so far as the withdrawing shareholders may be regarded as creditors, as to which fact there is some controversy in argument. There are two classes of persons who claim to be entitled to participate in the distribution of the assets of the corporation: 1. Those who gave notice of withdrawal before the appointment of the receiver, who claim to be preferred, and to be entitled to full payment before the other shareholders are entitled to anything;

and 2. Those who did not give such notice, who claim that all shareholders (that is, both classes) should share equally. The articles of incorporation provide for two funds—a loan fund and an expense fund. The following is a provision of the by-laws under which it is claimed that the withdrawing shareholders should be preferred and first paid:

“Sec. 9. Any shareholder in good standing, after giving thirty days’ notice in writing, and upon the surrender of his certificate, may withdraw, after three months’ dues have been paid, the full amount of his payments to the loan fund, together with the earnings up to the last dividend period. Said withdrawals shall be paid according to the priority of notice.”

The stock of the corporation is classed from A to F, but the classification is not important for our consideration. The following is a further provision of the by-laws:

“Art. 17. This association shall not be liable to pay out on account of withdrawals of all classes of stock, during any one month, more than thirty per cent of the cash receipts of the loan fund during such month, upon all classes of stock except Class F, and except stock issued under the provisions of section 2 of article 7 of the by-laws. In case of withdrawal before maturity, there shall be charged against the book value thereof a withdrawal fee of ten cents on ³⁰ each share.”

By a misappropriation, the loan fund has been used for the expenses of the corporation to an amount in excess of thirty-six thousand dollars, and while, in argument, there is some contention otherwise, the corporation is insolvent. In considering the rights of withdrawing shareholders from such associations, the cases discuss the effect of the association being, at the time of withdrawal, “a going concern,” or insolvent, and its affairs being “wound up.” It is quite evident that the by-laws of this association were adopted with reference to doing business, rather than with reference to closing up its affairs. This fact is important in determining what must have been the mutual understanding of the incorporators in their adoption of the article and laws, and also the understanding of those who became shareholders afterward. Section 9 of article 13 gives the absolute right of withdrawal on thirty days’ notice, and just as absolute a right to withdraw payments to the loan fund, except that it must be done in a way prescribed. That method is fixed by article 17, which exempts the association from liability for such withdrawals, so that it is not required to pay, in any one month, more than thirty per cent of the cash receipts of the

loan fund during such month. Speaking of such an association as a going concern, there would seem to be no question but that a withdrawing shareholder, on presentation of his certificate, could demand and should receive payment, in the order of his withdrawal, of as much money as the treasury afforded, of the thirty per cent specified, and no more. If there were no provision for such payment, none could be made from the fund, and the shareholder must hold his stock or exchange it in the market. The right of withdrawing the stock—that is, withdrawing the payments—depends entirely on the by-laws authorizing it. The by-law is not a limitation on a prior right—that is, a right existing ⁴⁰ independent of the by-law, perforce of a person being a shareholder—but it is a grant of a right, and limited by the terms of the grant.

In *Heinbokel v. National etc. Assn.*, 58 Minn. 340, 49 Am. St. Rep. 519, this particular question is considered. The by-law in that case is so like the one in this case as to make the authority entirely applicable. It is said in that case: "In assuming the relation of a member of the association, plaintiff contracted with reference to, and was to be governed by, its by-laws in so far as they were reasonable, and not opposed to our statutory provisions regulating associations of this character. He agreed to abide by the condition of the treasury in case of a withdrawal, and to take his money when funds properly applicable for the purpose were on hand. He was not to be paid until these funds were in the treasury, and, although he could at any time cease to be a member, and terminate his obligation to make monthly payments, the amount to be returned to him did not then become due or payable except in a certain contingency. If not absolutely and immediately due and payable at withdrawal, it is difficult to see how his cause of action was then maintainable." In that case, the questions are considered whether or not a withdrawing shareholder becomes a creditor upon complying with the law for withdrawing his payments, and also whether he could bring an action and obtain judgment against the association when there is no money legally applicable for the payment of his claim. It is held that such a shareholder is not to be regarded as having the rights of the ordinary creditor, and hence that he could not maintain such an action. It is further said in that case: "The right to draw and receive back what has been paid into the treasury by a member of the association exists solely by virtue of the by-laws or the statute. If this right to receive the money out of ⁴¹ the treasury is made to depend

upon its condition, the right is not perfect or absolute until that condition exists." In *Texas etc. Assn. v. Kerr* (Tex. Sup., May 2, 1890), 13 S. W. Rep. 1020, where the right of withdrawal was given in the by-laws, and there was a provision that at no time should more than one-third of the funds in the treasury be applied to the demands of the withdrawing stockholders without the consent of the directors, it was held that there could be no recovery by such a stockholder in the absence of a showing that there were funds applicable, or that the directors had consented to the use of other funds. *Christian's Appeal*, 102 Pa. St. 184, involved a question as to the right of withdrawing stockholders to preference after the payment of the general creditors, under by-laws so similar to those in the case at bar as to make the rule of the case authority; and it is there said as to such stockholders: "If the association has been prosperous, they have the right, under certain limitations and restrictions, to demand and receive their proportionate share of the accumulated fund; but if bad investments have been made, or losses have been sustained, before actual withdrawal, they must bear their just proportion thereof. . . . When a building association has failed to fulfill the object of its creation, and has become hopelessly insolvent, it cannot be justly or equitably wound up on any other principle than that above suggested. After expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed pro rata among those whose claims are based upon stock of the association, whether they have withdrawn and hold orders for the withdrawal value thereof or not. Both classes are equally meritorious, and, in the marshaling of the assets, neither is entitled to priority over the other. The claims of each are alike based ⁴² on their relation to the association as members thereof." The case refers to *United States etc. Assn. v. Silverman*, 85 Pa. St. 394; and, while it does not overrule or distinguish it, it announces the above rule with the former case in mind. It is not easy to reconcile the two cases in some particulars, and undoubtedly the last should be taken as the judgment of the court wherein, if at all, the cases are not in harmony. The *Silverman* case is reviewed in *Heinbokel v. National etc. Assn.*, 58 Minn. 340, 49 Am. St. Rep. 519, and the holding is disapproved. In *Endlich on Building Associations*, second edition, section 114, it is said, speaking of the by-law provisions of such corporations, that only a proportion of the funds can be withdrawn for the purpose of paying withdrawing

stockholders: "This, then, becomes a charter limitation upon the rights of withdrawing members, and operates to prevent a conflict between them and the undisturbed exercise of the association's corporate functions by narrowing them down to a certain portion of its assets as the source of their payment."

It seems to us that these authorities, as well as the language of the by-laws of the association in this case, fix a limitation on the rights of withdrawing shareholders as to the funds applicable to the payment of their claims, and that beyond such limit they cannot go. In this case there is, confessedly, no such fund available. We have seen no case in which the limitation is like the one in this case, it being limited to thirty per cent of the monthly receipts. This limitation, throughout the authorities in this country, seems to be of controlling importance. Insolvency but adds to the strength of such a position, and the holding in *Christian's Appeal*, 102 Pa. St. 184, is in a case where the corporation was insolvent, and the rule was there applied. Both parties have quoted from, and argued the effect of, some English cases, and, conceding them to announce a different rule (and to quite an extent they do), we are still ⁴³ content with the rule that is supported by the weight of authority in this country, and best accords with reason. No one contends that such a conclusion is not the equitable one, the contention of intervenors being only that a correct legal construction of the by-laws justified their claim, but in that view we do not concur. As we said at the outset, the provision of the by-laws for paying back contributions to the loan fund contemplated monthly receipts to such fund, so that the corporation, as a going concern, could apply a percentage thereof to such a purpose; and there is nothing to show a purpose to make such payments after such receipts have ceased, and the only business of the corporation is a final settlement and an equitable division of the assets. We think the judgment should be so changed as to make a pro rata payment of all stockholders, regardless of notices of withdrawal, and the cause is remanded for such a decree.

Reversed.

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWALS—INSOLVENCY.—Where the by-laws permit members to withdraw from a building and loan association upon terms therein specified, and such withdrawal is made in good faith before the association is ascertained to be insolvent, the stockholders thus withdrawing are relieved from all further liability, though it is subsequently ascertained that the corporation is insolvent. One, however, who has merely given a notice of his intention to withdraw has not changed his relation to the corporation, and is not entitled to thereafter be

regarded as a creditor rather than a stockholder: See monographic note to *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 30, as to the effect of the insolvency of building and loan associations upon the rights and liabilities of their members. See, also, monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 155, 156.

STATE v. MAYOR AND CITY COUNCIL OF DES MOINES.

[103 IOWA, 76.]

CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—A statute which attempts to delegate to a board of library trustees appointed by a mayor with the consent of the city council, the absolute power to fix the amount of taxes to be raised for library purposes is unconstitutional and void as a delegation of the taxing power, without the consent of the people, to a body of persons not elected by, nor immediately responsible to, the people.

CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—Although the legislature may, for legitimate purposes, delegate the taxing power to municipalities, it cannot be delegated, without the consent of the people of the municipality, to any person or persons not elected by, and immediately responsible to, the people.

CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—The acceptance by the people of a city of a statute authorizing the establishment of public libraries by cities does not operate as an assent by them to the provisions of a subsequent statute which is unconstitutional as delegating the taxing power to boards of trustees of such libraries.

Read & Read and Hubbard & Dawley, for the appellant.

J. K. Macomber and Bishop, Bowen & Fleming, for the appellee.

¶ KINNE, C. J. The conceded facts in this case are as follows: The city of Des Moines, a city of the first class, in 1882, by a vote of its electors, accepted the provisions of the statute of this state relating to the establishment and maintenance of free public libraries, and had, in the exercise of the powers conferred upon it, established and was maintaining such a library. In pursuance of law, a board of library trustees had been appointed and was exercising the powers and duties imposed upon it. On July 31, 1896, said board of trustees did fix and determine a rate of taxation of one mill on the dollar of the taxable valuation of the property in said city for the purpose of maintaining the public library, and at the same time did fix and determine a rate of taxation of three mills on the dollar for the purpose of creating a sinking fund for the purchase of a lot and the erection of a library building, and did cause said

amounts so fixed and determined to be certified to the city council of said city. Said city council ⁷⁸ refused to levy and certify to the county auditor said amounts so certified to them by said board of library trustees, but did levy and certify one-half a mill tax for the purpose of the maintenance of the library. Thereupon this action was brought to obtain a writ of mandamus compelling the city council to levy and certify the rates of taxes fixed and determined by the board of library trustees. As is said by counsel for appellants: "The ultimate question to be determined is, whether or not the city council in cities of the first class accepting the provisions of the statute relating to the establishment and maintenance of free public libraries, and maintaining such library, is bound and required to levy and certify the amount of taxes or the rate of taxation fixed and determined by the board of library trustees of said city."

2. On the one hand, it is contended that the statute vests in the board of library trustees absolute power to fix and determine the amount of the levy to be made for the purpose of maintenance of the library, and of creating a sinking fund for the purchase of a lot and the erection of a library building, subject only to the limitations in the statute; and that the duty devolves upon the city council to levy and certify the sums so certified to them by said board; that the city council is without any discretion in the matter. On the contrary, the appellees contend that the board of library trustees has no such power; that its power in the matter is advisory merely, and that the city council is invested with a discretion as to the amount or amounts which shall be levied for the purposes mentioned. As in the discussion which may follow, reference may be made to various acts of the legislature touching the creation and maintenance of free public libraries, it may tend to brevity to here recite the substance of all such statutes which can have any bearing upon the ⁷⁹ question under consideration. Chapter 45 of the acts of the thirteenth general assembly provided that cities of the first and second classes might levy an annual tax, not exceeding one-half mill on the dollar of the taxable property in such city, for the maintenance of a free public library and reading-room, provided a suitable lot and building be first donated for such purposes. The city council was authorized to appoint officers for such library and reading-room. The fourteenth general assembly, in chapter 47, extended the provision of the former act so as to include incorporated towns, increased the amount of the levy, and authorized all the municipalities re-

ferred to in the act, out of the money raised, to purchase land and erect buildings or lease rooms. The act also provided that before exercising any of the powers conferred, it should be accepted by a vote of the people. The same provisions, in substance, were incorporated in the code of 1873, section 461, in which it was declared that "the establishment and maintenance of a free public library is hereby declared to be a proper and legitimate object of municipal expenditure." Such was the law in force at the time the electors of the city of Des Moines voted to accept its provisions, and to establish a free public library. By chapter 41 of the acts of the twenty-fifth general assembly, it was provided that in any city which had accepted the provisions of code, section 461, there should be created a board of library trustees, to be appointed by the mayor, with the approval of the council. That act vested in said board full power of control over the library, including the power to appoint and remove librarians and employes; that they should have full power over the moneys raised for the library by taxation; and said act also contained the following, viz: "The board of library trustees shall, before the first day of August in each year, determine ⁸⁰ and fix the amount or rate to be appropriated for one year under section 461 of the code of Iowa for the maintenance of such library, and cause the same so fixed to be certified to the council, and the council shall make such appropriation and levy the necessary tax for such year to raise said sum and certify the percentage or rate, not exceeding one mill on the dollar of such tax, to the county auditor, . . . provided that in cities of the first class the city council may and shall levy and certify such further sum of tax as it may deem expedient to create a sinking fund and pay interest under the provisions of chapter 18 of the acts of the twenty-second general assembly, and acts amendatory thereof." By chapter 99 of the acts of the same general assembly power was conferred upon the city to levy and collect a tax of not exceeding three mills on the dollar to pay interest on any indebtedness theretofore contracted or to be thereafter contracted or incurred for the purchase of real estate and the erection of a building or buildings for a public library, and to create a sinking fund for the payment of such indebtedness. By chapter 5 of the acts of the twenty-sixth general assembly, the tax was authorized to be collected annually. By chapter 50 of the acts of the twenty-sixth general assembly, it was provided that the board of library trustees should determine and fix the rate, not exceeding one mill on the dollar, for

the maintenance of the library, and not exceeding three mills on the dollar for the purpose of paying for a building and the creation of a sinking fund, and "cause each of the amounts or rates so determined and fixed to be certified to the council, and the council shall levy the taxes necessary to raise said sums respectively for such year, and certify the percentage or rates of such tax to the county auditor." In pursuance of the provisions of chapter 41 of the acts of the twenty-fifth general assembly, a ⁸¹ board of library trustees had been appointed. In March, 1892, the city of Des Moines, as it then existed, by a vote of the electors, accepted the benefit of the law relating to public libraries. Prior to the passage of the acts of the twenty-sixth general assembly, the city council was clearly invested with discretionary power as to levying a tax for a library building and for the creation of a sinking fund. The act of the twenty-sixth general assembly, in terms, seems to require the council to levy and certify the tax certified to it for maintenance and for a building or sinking fund, so long as the same does not exceed the amount provided by the statute.

3. The questions involved in this appeal are of great interest and importance. Irrespective of our duty to uphold the act of the legislature as constitutional, if it be possible to do so without doing violence to well-known legal principles and accepted canons of construction, our interest in the welfare of the people, which is so largely promoted by the establishment and maintenance of public libraries, would prompt us to give the questions presented most careful consideration. If it be conceded that a tax for the maintenance of a public library and for the erection of a library building is a tax for a public purpose, and hence one which, in furtherance of the general public policy of the state, may be compelled to be levied, may the legislature authorize its levy by the board of library trustees? Touching the power of the legislature to delegate the taxing power, Judge Cooley says: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no ⁸² exception, and it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power, and within that power lies the authority to prescribe the rules of taxation, and

to regulate the manner in which those rules shall be given effect. . . . There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive. These exceptions relate to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into matters of taxation; the state in very many cases doing little beyond prescribing rules of limitation within which, for local purposes, the local authorities may levy taxes. . . . The legislature, however, in thus making delegation of the power to tax, must make it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. . . . What is true of the state is equally true of the municipality—that the power they possess to tax must be exercised by the corporation itself, and cannot be delegated to its officers or other agencies”: Cooley on Taxation, 2d ed., 61, 63, 65. The doctrine laid down by the learned author is, that the delegation of the power to tax by the legislature must be made to the municipality itself, and that it cannot be delegated to other agencies.

⁸³ The constitution of the state of Illinois contains the following provision: “The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes”: Ill. Const. 1848, art. 9, sec. 5. In construing this provision, the supreme court of that state said that the phrase “corporate authorities,” as used in the constitution, must be understood as “those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent”: *People v. Mayor etc.*, 51 Ill. 17; 2 Am. Rep. 278. The same court, in construing the same constitutional provision, said: “The power of taxation is, of all powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people; and, if committed to people who may exercise it over others without reference to their consent, the certainty of its abuse would simply be a question of time. No person or class of persons can be safely in-

trusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that ⁸⁴ it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated." *Harward v. St. Clair etc. Drainage Co.*, 51 Ill. 130. In still another case, in which the constitutionality of the metropolitan police act of the city of East St. Louis was under consideration, and in which the police commissioners were appointed by the act, and given power, not to levy a tax, but to estimate what sum of money would be necessary for each fiscal year to enable them to discharge the duties imposed upon them, and the act required the city council to appropriate and set apart the amount so certified out of the general fund of the city, and, in case the council failed so to do, then it was made the duty of the board of commissioners to issue certificates of indebtedness in the name of the city for the amounts so certified, the court said: "These police commissioners are not the corporate authorities of East St. Louis, and therefore can have no power of taxation. They are not elected by the people of that city nor appointed in any mode to which the people have given their assent. The act creating them has never been accepted by the people or by the city council, but, on the other hand, as alleged in the bill, the council has constantly denied the authority of the commissioners": *Hinze v. People*, 92 Ill. 406. See, also, *Updike v. Wright*, 81 Ill. 49; *People v. Morgan*, 90 Ill. 558.

The legislature of the state of Kansas passed an act authorizing the creation of a board of road commissioners, and empower-

ing them, among other things, to levy taxes. The act was held unconstitutional: Board of Commrs. v. Abbott, 52 Kan. 148. The question of the constitutionality of the same ⁸⁵ act came before the federal court, and the court said: "Does the constitution of the state of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be absolutely forced upon these taxpayers of the county, either by the individuals or by officials in whose appointment they have had no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed, and their powers limited, by organic law; and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly, those directly interested may then remove them and appoint others. If those directly interested have no voice in their appointment, or power to remove them, they have no means of correcting their abuses. No other rule can secure those to be taxed from oppression and fraud on the part of the taxing officers. In *McCulloch v. Maryland*, 4 Wheat. 428, Marshall, C. J., said: 'The only security against the abuse of this power [the taxing power] is found in the structure of our government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.' This reasoning applies with equal force to all kinds of taxation and has been applied as well to local assessments or improvement districts as to taxes levied in local, political, and municipal corporation. ⁸⁶ . . . Self-taxation, or taxation by officers chosen by or answerable to those directly interested in the district to be taxed, is inseparable from that protection of the right of property that is either expressly or impliedly guaranteed by all written constitutions under our system of government. Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. . . . The act is a plain violation

of the principle of self-taxation, and a clear invasion of the right of property. The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people. The right of life, liberty, and property is among the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the protection, and not for the destruction, of these reserved rights of the people. Illegal or oppressive taxation is destructive of the right of property, and is not government, under the constitution; but is misgovernment”: *Parks v. Board of Commrs.*, 61 Fed. Rep. 436.

The legislature of the state of Michigan passed an act creating a board of park commissioners to be appointed by the governor, with authority to create an indebtedness, and the act was held unconstitutional. Mr. Justice Campbell, in specially concurring with other members of the court, said: “I am not willing, however, to leave out of view an objection which has seemed to me quite as fundamental as the one referred to, and more dangerous, if that be possible, in its tendencies. I think the very essence of municipal ⁸⁷ existence consists in a government which allows no discretionary power beyond that of mere administration to be exercised without the immediate or ultimate control of the freemen or their immediate representatives. A city is, and must be, as I conceive, a unit for purposes of government; and all bodies employed in the service of the municipality, and not directly representing the freemen, must act as agencies subordinate to the council. If powers in any way involving the municipal prerogative can be given to any bodies except the common council, to the exclusion of any regulation or control of that body, they can all be so given, and the people may be entirely deprived of representative government. It is a misnomer to apply that term to a system where there is any legislative power over which the people’s representatives have no control. A school district is as well organized a municipality as a city, and may coexist with it in territory, in whole, or in part, as a city may cover the territory of a county wholly or partially. There is no incompatibility between them, and both are separate, and in some sense independent, popular representative bodies exercising different functions. The duties of the others are no part of the ordinary concerns of town or city corporations.

But from time immemorial every municipal government, properly so called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the state can limit their powers, but it cannot transfer them. The appointment and incorporation of boards as mere agencies is competent, and may be very convenient. But making them anything ^{ss} but agencies is a direct invasion of representative government, and would bring into existence a class of cities unknown to our constitutions, and very different from the municipal corporations recognized by our constitution as the authorized recipients of local legislative power. Whether the law of 1871 contains any provisions obnoxious to this principle, it is not necessary to discuss. But, if there are such provisions, I do not conceive they could be made valid by any recognition from the city. Concurring entirely in the general views of my brother Cooley, I have not deemed it necessary to do more than indicate very briefly my views on the point which he has waived, which, in my judgment, is inseparable from the principles underlying the decisions heretofore made in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and *People v. Township Board*, 25 Mich. 153. I therefore agree in the conclusion of my brethren": *People v. Common Council*, 28 Mich. 228; 15 Am. Rep. 202.

Under our constitution, the power of taxation has been vested by the people in the legislature: Const., art. 3, sec. 1; *Davenport v. Chicago etc. R. R. Co.*, 38 Iowa, 643. There is no express constitutional restriction or limitation upon the power of the legislature in this state, and that body may, for proper and legitimate purposes, confer the taxing power upon municipalities: 2 Dillon on Municipal Corporations, sec. 740; 25 Am. & Eng. Ency. of Law, 18, 71. Nevertheless, in the absence of such constitutional restriction, the power of the legislature to confer the right of taxation is limited by implication: *Prouty v. Stover*, 11 Kan. 235. So it is said in *Hanson v. Vernon*, 27 Iowa, 73: "It cannot be maintained that the constitution confers upon the state government absolute and unlimited legislative power, authorizing all laws affecting the rights and property of the people ^{so} not expressly prohibited by that instrument. . . . There is, as it were, back of the written constitution, an unwritten constitution, if I may use the expression, which guaran-

tees and well protects all absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the constitution, nor preserved by express provisions thereof, notwithstanding they exist, and are possessed by the people free from government interference." We say, then, that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. Whatever the effect of the constitutional provisions in Illinois and Kansas may be, the reasoning of the cases is in line with the views expressed by Judge Cooley, and it is equally applicable to cases where there are no express constitutional limitations. It is said that it is not true that power to determine the rate of taxes must be committed to the proper legislative authority of the corporation, and certain instances in this state are cited, as the power given the executive council to determine the rate of tax for state purposes: Code 1873, sec. 835. But counsel have cited no instance in the legislation of this state, and we have found none, where the power to tax was conferred upon a board or officer not elected by and immediately responsible to the people, and we are unwilling to extend the right to delegate such power to any body or person not directly representing the people. The danger which lies in delegating such power to any person or board not directly responsible to the taxpayers is so forcibly set forth ²⁰ in the citations we have made that we need not enlarge upon it. If the power to tax may be by them vested in a board of library trustees, against the will of the people, it may be reposed in any other body which is not directly accountable to the people.

Counsel for appellants rely upon the cases of *Mayor v. State*, 74 Am. Dec. 572, and *State v. District Court*, 33 Minn. 235. The latter case, in its facts, is so different from the case at bar as not to support the contention of appellant; and the Maryland case sustained the constitutionality of an act authorizing the board of police commissioners to levy and collect taxes for the support of the police department of the city. If this case is sustainable at all, it is upon the theory that the state may insist upon the proper exercise of the police power by a municipality, and, if the municipality fails so to do, the state may arbitrarily provide therefor. This is on the theory that one of the objects

of the government of the state is to preserve peace and good order.

We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which, upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary, and far-reaching power ought ⁹¹ not to be conferred upon a body of persons who are not the direct representatives of the people, who are not elected by them, and who, therefore, are not directly responsible to them, unless the people assent thereto.

4. The remaining question is, Have the people of the city of Des Moines in any manner assented to the exercise of the power of taxation attempted to be conferred upon and exercised by the board of library trustees? The people of the city did by vote accept the provisions of the law as it then existed. The law then did not authorize any increase of taxation, and the library was under the direct control and management of the city council, who were elected by the people. By subsequent acts of the legislature a board of trustees was established, and their duties and powers fixed; the control and management of the library was by statute vested in said board, and the board was vested with the power of absolutely determining the amount of tax that should be levied. It will be seen that the people assented by their vote to maintaining a public library, which should be under the control of the council which they elected. They never consented to the creation of a board of library trustees which should be in control of the library, and be substantially vested with the power to levy taxes without the consent and against the will of the people. The placing of the extraordinary power of taxation in a body not the direct creation of, or directly responsible to, the people, was in no way involved in the vote of the people had before such powers were conferred or thought of. Here, by an act passed subsequent to the vote of the people, the legislature empowers an irresponsible board (irresponsible in the sense that they are not directly accountable to the people) to fix

a tax levy limited in the amount which may be raised each year, but unlimited in duration, so that millions of dollars may be accumulated without consulting the ⁹² people, or their immediate representatives, the city council. It may be doubted if any statute of this state can be found wherein such extended and unlimited power as to duration of time has been granted to a body of persons to fix what taxes shall be levied for any such purpose. This law authorizes a levy annually upon the taxable property of the city for the purpose of purchasing real estate, and the erection of a building, and to create a sinking fund; absolutely no limit as to the number of years said tax may be levied. Under its provisions millions may be accumulated and spent, and, if appellant's theory is correct, the taxpayer who assented to the formation and maintenance of a public library simply was then voting upon himself a burden of taxation for a library building and ground which might be endless in duration as to the ultimate amount to be raised, and which might be invested in a building the cost of which would likewise be unlimited. That a body or board, not elected by the people, and not directly responsible to them, should have been clothed by the legislature with such extraordinary powers without proper safeguards to protect the people from unnecessary taxation—which is confiscation—is marvelous. The people of the city of Des Moines never assented by vote or otherwise to any such legislation: *Cornell v. People*, 107 Ill. 372.

Nor can we agree to the contention that, inasmuch as the people elect the city council and the mayor, and the mayor appoints the library board with the consent of the council, therefore such board is, in fact, selected by the people, or that thereby the people assented to the legislation creating the board and endowing it with the power to fix and determine the taxes to be levied. If such contention was correct, it would be difficult to find a case of an officer or board vested with taxing powers, no matter by whom appointed, when by the ⁹³ same process of reasoning the original power could not be traced through the various offices or agencies to the people themselves. Suppose the act at bar had provided that the board of library trustees for the public library of the city could be appointed by the governor of the state, it would not be contended for a moment that the people, by voting for and electing the governor who appoints such a board, thereby gave their assent to such a mode of appointment. No more do they when they elect the mayor and council, whom they must elect in order that the proper business of

the municipality may be carried on. Under such an argument, any violation of the taxing power might be ultimately traced to the people, who are the original source of all political power in a government like ours. The power to determine and levy taxes is inherent in government. Its exercise for proper purposes is essential to the very existence of government. When exercised in a lawful manner, and by proper agencies of the state, the burdens imposed must be borne by those upon whom they fall; but when exercised by officers and bodies charged with no direct responsibility to the people the temptation to place upon the people unnecessary burdens under the guise of taxation, and to take from them a portion of their property not needed for legitimate purposes of government, is great. It may be admitted in the case before us that the board of library trustees is composed of high-minded, honorable men and women, and it may be that this board is better qualified to know what such tax should be than is the city council. However that may be, the principle is wrong, and the power of taxation attempted to be conferred upon the trustees is a long step in the direction of permitting ⁹⁴ boards not elected by or directly responsible to the people to determine what burden the taxpayers' property shall bear. We hold that no officer and no board not elected by and immediately responsible to the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of a wrong at the polls; but if it be reposed in a body not elected by the people the remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation, as to duration, attempted to be conferred by the act under consideration, is of itself a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred upon somebody which stands as the direct representative of the people, to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear such burdens. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board, and certified to said council. The questions involved in the case were not raised or considered in *Orvis v. Board of Commrs.*, 88 Iowa, 674; 45 Am. St. Rep. 252. The action of the district

court in refusing a writ of mandamus and in rendering a judgment against the plaintiff for costs was correct, and the judgment is affirmed.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—DELEGATION OF POWER TO TAX.—Legislative power cannot, as a rule, be delegated: Note to *Chicago v. Stratton*, 53 Am. St. Rep. 231. The legislature cannot delegate to any person or body the power to determine what the law shall be, except when authorized by the constitution to do so: *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182; 50 Am. St. Rep. 400, and note. Municipal corporations may be vested with the power of taxation, but such power can only be exercised according to charters, and within the limits of the constitution of the state: *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723. The rule of taxation must originate in, and be established by the legislature. To refer the making of it to another authority would be in excess of legislative power: See monographic note to *Mayor etc. v. State*, 74 Am. Dec. 591; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; 72 Am. Dec. 276. The legislature may delegate the power of levying a tax for special purposes to police commissioners appointed by the legislature instead of to the city authorities: *Mayor etc. v. State*, 15 Md. 376; 74 Am. Dec. 572.

HOLIDAY v. AMERICAN MUTUAL ACCIDENT ASSN.

[103 IOWA, 178.]

INSURANCE—ACCIDENT—HAZARD—CHANGE OF OCCUPATION.—One insured as by occupation a bookkeeper against accident, under a policy providing that if the insured is injured while engaged in a more hazardous occupation he shall be entitled only to such indemnity as the premiums paid would purchase in the class in which such occupation is classified, and classifying as more hazardous the occupation of hunting, is entitled to recover the indemnity provided for a bookkeeper, although injured by the discharge of his gun while hunting as a recreation.

INSURANCE—ACCIDENT—WAIVER OF DEFENSE.—The defense that injury resulted from exposure to unnecessary danger under an accident insurance policy is waived by an offer to confess judgment for an amount less than is claimed and by a subsequent motion for a verdict in accordance with such offer.

Dodge & Dodge and Phillip & Hicks, for the appellant.

Kelley & Cooper, for the appellee.

¹⁸⁰ GRANGER, J. 1. It is first urged that the court erred in directing a verdict for plaintiff, because there was a question of fact whether the plaintiff, at the time of the injury, was not engaged in a more hazardous occupation than the one in which he was insured, being that of a bookkeeper. It appears in the statement that there was an offer to confess judgment for two hundred and ninety-two dollars and fifty cents; and in defend-

ant's motion to direct a verdict, in one division thereof, it asks the court to direct a verdict for plaintiff for that amount "up to the time of the tender, as set forth in defendant's answer." This condition of the record fixes a right of discovery, leaving only the question of amount, which is made to depend on the classification under which a recovery can be had. The following is a provision of the certificate: "4. That the association shall have the power at any time to cancel this certificate upon refunding any balance of the premium standing to the credit of such member ¹⁸¹ on its books; and if injury occurs while performing an act pertaining to an occupation classed by it as more hazardous than the one under which this certificate is issued, or while engaged in a more hazardous occupation, such member or beneficiary shall be entitled to such an amount of indemnity as the premiums paid would purchase in the class in which such occupation is classified." It will be seen that a main contention arises over whether the plaintiff, when injured, was engaged in the occupation of a hunter or hunting, within the meaning of the contract, so as to change the classification under which he is entitled to indemnity from $\frac{1}{2}$ AA to E. The facts are not in dispute, and are substantially as follows: The plaintiff and others had been hunting, and plaintiff was carrying a hammerless gun, which cocked only by breaking it down to insert the shells containing the charge of powder and shot. There were no hammers to catch, as is many times the case, and discharge the gun. There was a safety catch, which, when "set at safety," prevented a discharge until pushed "to shoot." Plaintiff was coming to the wagon, which was in the highway, from a field; and, as there was no gate, he had to cross a wire fence. With his gun, as claimed by him, at "safety," he placed it across a wire of the fence, with one hand on the stock, and the other on the barrels, so as to press down a wire of the fence, and make an opening through which to pass. He passed his left foot through to the other side, and bent his body, and passed through; and as he was straightening up, after being through, he stumbled, because of a hole in the ground; and in some way the safety catch was changed, and the gun discharged, causing the injury. It should perhaps appear that there is doubt as to the condition of the safety catch on the gun. Every essential fact from which to reach a conclusion is in this statement. That, for the time being, the plaintiff ¹⁸² was engaged in a more hazardous work than that of a bookkeeper admits of no question, and the jury must have so found had the question been

submitted. In fact, the court could have so stated to the jury. There is no other question of fact. Whether that fact has the effect of changing the classification is one of law, and we do not think there was a disputed question of fact in the case for the jury to determine.

2. A more difficult question is how the fact affects the classification. We may fairly present the question in this way: Does the association intend, and should one accepting its proposition for membership understand, that, if accepted under the classification AA, wherein the indemnity is larger because of the decreased risk, such indemnity is to be paid only if accident occurs while he is doing those things because of which he is admitted to such classification? As, if a minister, must the accident occur while doing the distinguishing duties of a minister; or, if a lawyer, while doing his professional work; or, if an artist, while doing the work of an artist—with, perhaps, in each case, the essential duties of home, of society, and of citizenship? Or does the association intend, and should such a person understand, that the classification is based on the decreased risk because of the effect of such callings lessening the hazard, in view of the usual experiences of such men, not professionally, but as a whole? It seems to us that reason and authority sustain the latter rule.

An authority relied on by appellant is *Standard etc. Ins. Co. v. Martin*, 133 Ind. 376. In that case, the classification in which the assured was accepted was that of a passenger brakeman, and twenty dollars would purchase two thousand dollars in that class. The occupation of brakeman on a construction train was ten times more hazardous, and the assured, ¹⁸³ after the insurance, changed his occupation to that of a brakeman on a construction train. The case holds that the recovery should be in the latter classification, and, we think, correctly so. In *Knapp v. Preferred Mut. Acc. Assn.*, 53 Hun, 84, where a policy issued to a person classed as a "retired gentleman," with a proviso against liability for injuries resulting from exposure not incident to the occupation under which he received membership, and he was injured while operating a buzz saw for amusement, it was held there could be no recovery. It was hardly to be contemplated, when the policy issued, that working with a buzz saw would be an amusement of a retired gentleman; but, on the contrary, it would be one of the resorts for amusement that would not be contemplated. The known danger of such a resort would suggest its exclusion. The case of *Aldrich v. Mercantile Mut. Acc. Assn.*,

149 Mass. 457, is where the certificate issued to a "spare conductor, through freight." The assured was killed while acting as brakeman on a through freight, under another as conductor. The risk of brakeman was classed as more hazardous than that of conductor. A recovery was only allowed under the more hazardous risk. It will be seen that in these cases, except the Knapp case, there was a change of occupation or employment, at least temporarily. The case of Union Mut. Acc. Assn. v. Frohard, 134 Ill. 228, 23 Am. St. Rep. 664, is quite similar to this. The assured was a teacher, and was killed while overlooking the construction of a building he was having erected. It was said in the case: "The word 'occupation' . . . must be held to have reference to the vocation, profession, trade, or calling which the assured is engaged in, for hire or profit, and not as precluding him for the performance of acts and duties which are simply incidents connected with the daily life of men in all occupations, ¹⁸⁴ or from engaging in mere acts of exercise, diversion, or recreation." In North American etc. Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212, the business of the assured was that of an earthenware manufacturer, and he was killed while on a visit to his grandfather, and assisting in hauling in and unloading hay. Speaking of a change of occupation, it is said: "But this was not a change of his occupation or business, within the meaning of the policy. To give the word such a construction would prevent the assured from performing any act or service outside of his usual avocation, or business without rendering the policy null and void." We do not overlook the particular language of the certificate that limits the liability where the accident "occurs while performing any act pertaining to an occupation classed by it as more hazardous than the one under which the certificate is issued." This language is more doubtful than that as to a change of occupation. With considerable study, we are not able to give the words quoted a meaning in connection with the facts of the case. As applied to this case, "occupation" must mean hunting. We think, within the meaning of the certificate, the plaintiff was not engaged in the occupation of hunting when the injury occurred, so that the liability of the defendant can be lessened for that cause. That he was hunting, there is no question; and, by all authority, there may be hunting without its being an occupation. The classification by which the hazard of hunting is fixed is that of hunting as an occupation. Now, the plaintiff was carrying a loaded gun, and getting through the fence. What was the act pertaining to the occupation of hunt-

ing? There could be nothing more than the fact that he was hunting; and if the mere fact of hunting for recreation is not such an occupation, within the meaning of the policy, how does it pertain to it—that is, pertain to the occupation (which the authorities hold to mean, not hunting for amusement, but as a business or calling for profit or hire)? Such a ¹⁸⁵ carrying of the gun no more pertained to the occupation of hunting than would the carrying of a gun from one place to another with no intention to hunt. The carrying of the gun would be an act to be done in hunting, and it might pertain to hunting, but not to it as an occupation. The entire classification of the defendant association is before us, and it seems to be entirely based on occupations; that is, occupations, and not acts, are the basis of classification. In *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 664, the policy contained the term “any act or occupation,” and the case is quite in point on this question. After some consideration of this question, it is said: “There is not in the by-laws or in the record any classification of hazards in respect to acts; in other words, there is no act which is classified as more or less hazardous than another, and no act is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased. The case, then, does not stand otherwise than it would if the word ‘act’ were not found in the contract.” We do not see why this language is not applicable to this case.

3. A provision of the policy prevents a recovery for injuries resulting from exposure to unnecessary danger. Such a defense goes to the entire right of recovery. In view of the offer to confess judgment for two hundred and ninety-two dollars and fifty cents, and of the motion made after the evidence was in, we do not see how this question is longer involved. The offer to confess and the motion are an acknowledgment of a right of recovery, so that the only question was as to the classification that should fix the amount. The fact of unnecessary exposure has no bearing on that question. The judgment is affirmed.

INSURANCE—CONDITION AGAINST CHANGE OF OCCUPATION BY THE ASSURED.—The occupation of an assured is not changed from that of a merchant to that of a hunter by the fact that he, on a single occasion, engaged in the act of hunting as a recreation, and, while so engaged, he accidentally shot and killed himself. Therefore, the insurer is not exonerated from paying the amount agreed to be paid on the death of a merchant, though the policy declares “that any member receiving an injury while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or

his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury": *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664, and note; note to *North American etc. Ins. Co. v. Burroughs*, 8 Am. Rep. 218, 219.

HOLLENBECK v. HALL.

[103 Iowa, 214.]

LIBEL—WORDS NOT ACTIONABLE.—A publication by letter, stating of one that he has for some years owed for medical attendance, that his attention has been repeatedly called thereto to no purpose, that being sued therefor, and having no other defense, he has cowardly slunk behind that of statutory limitation, which course is not in accordance with the writer's idea of strict integrity, is not actionable as a libel.

Action for libel founded on the following letter:

"Cedar Rapids, Iowa, Dec. 7, 1892.

"P. E. Hall, Pres. C. R. & M. C. Ry. Co., Cedar Rapids, Iowa.

"Dear Sir: For some years past, one of your old and trusted conductors, Mr. James Hollenbeck, has owed us a bill for professional services rendered his family in the way of consultations, with his family physician, at his home in Marion. His attention has been repeatedly called to the subject, but to no purpose. We finally sued him, to which he responds by employing an attorney, and contesting the claim. Having no other defense, he cowardly shrinks behind that of statutory limitation. Such a course is not exactly in accordance with our idea of strict integrity. So far as we are concerned we would prefer not to be connected in an official capacity with a corporation giving employment to men of this character, especially when permitted to occupy a position of trust.

Yours courteously,

"H. & J. M. RISTINE."

Judgment for defendant and plaintiff appealed.

J. H. Crosby, H. Rickel and J. T. Christie, for appellant.

C. A. Clark, for the appellee.

²¹⁵ LADD, J. Conceding the letter to have been published, was it libelous? Our statute defines "libel" to be "the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive ²¹⁶ him of the benefits of public confidence and

social intercourse": Code 1873, sec. 4097. "Defamation" is defined by Webster as "the taking from another's reputation." Odgers, in his work on Libel and Slander, says: "Words which produce any perceptible injury to the reputation of another are called defamatory." It is "a false publication calculated to bring one in disrepute": Cooley on Torts, 193. The derivation of the word leaves no doubt as to its meaning. Was there anything in the letter injurious to the good name of the plaintiff, or tending to bring him into disrepute? It is not dishonorable to be indebted to another, nor is it libelous to publish of another that he owes money: *Regina v. Coghlan*, 4 Fost. & F. 316. To be in debt is very common, and to be unable to make payment does not necessarily involve moral turpitude. Nor is the debtor's reputation brought in question by making a defense which the law sanctions, and which rests on sound reason and long experience. Formerly, pleading the statute of limitations was looked upon with disfavor. Lord Mansfield remarked in *Quantock v. England*, 5 Burr. 2630, "that, in honesty, a defendant ought not to defend himself by such a plea." The statute is now generally conceded to be beneficial, and the defense as legitimate as any other. As said by Justice Story in *Spring v. Gray*, 5 Mason, 523: "The defense, therefore, which it puts forth is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practical manner, such as are ancient and unacknowledged, and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers to repel them. The natural presumption certainly is, that claims that have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute ²¹⁷ has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their overconfidence in regard to transactions which have become dimmed by age": See 3 Parsons on Contracts, 61; *Penley v. Waterhouse*, 3 Iowa, 418. It cannot be libelous to accuse one of doing what the law approves. In *Homer v. Englehardt*, 117 Mass. 539, it was held that to accuse one of availing himself of the prohibitory liquor law, in order to defeat an indebtedness for liquor sold, is not libelous, the court remarking that, "the plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so." *Bennett v. Williamson*, 4 Sand. 60, is precisely in point. Since the

law recognizes this defense as legitimate and honorable, to accuse one of making it would not amount to defamation: Bishop on Noncontract Law, sec. 283.

2. The entire letter must be considered, and therefrom the plain import and natural meaning as intended, and the sense in which it was understood, determined. The alleged facts are clearly stated. There is no mistaking them from the opinions expressed by the writers of the letter. The characterization of the acts is based entirely on the assumption that the conduct of the plaintiff in availing himself of the defense was not honest and in accord with their standard of integrity. The spirit and purpose of the letter may well be said to indicate an element of character quite as inconsistent with the Golden Rule as that which permits omissions in the matter of pecuniary obligations. Such a letter may be the subject of just criticism, but its publication does not expose to public hatred or contempt in the sense or to the degree required by the law of libel: See *Urban v. Helmick*, 15 Wash. 155; *Donaghue v. Gaffy*, 54 Conn. 257.

Affirmed.

LIBEL—WORDS NOT ACTIONABLE.—To constitute a libel it is not necessary that the writing should contain an imputation of an offense that may be indicted and punished. It is sufficient if the language tends to injure the reputation of the party, to throw contumely or reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455; *Rice v. Simmons*, 2 Harr. (Del.) 417; 31 Am. Dec. 766. A letter which intimates a suspicion of dishonesty may be a libel: *Hart v. Reed*, 1 B. Mon. 166; 35 Am. Dec. 179. But opprobrious words are not libelous: *Robbins v. Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152; and a letter merely intimating suspicions, and professedly written with a good motive, does not import libelous matter per se, without proof of extraneous facts authorizing the inference that the writer was actuated by express malice: *Hart v. Reed*, 1 B. Mon. 166; 35 Am. Dec. 179.

ANDERSON v. COSMAN.

[103 IOWA, 266.]

HOMESTEAD RIGHTS MAY EXIST IN LAND LEASED, or sold under contract, where the legal title remains in the vendor.

HOMESTEADS—ABANDONMENT BY WIFE.—A wife abandons her homestead right in lands held by her husband under a contract of purchase reserving title in the vendor, when her husband, with her knowledge and consent, surrenders such contract to the vendor, who, under agreement between the parties, conveys the land to a purchaser from the husband, and husband and wife thereafter remain on the land as tenants under circumstances entirely inconsistent with any claim of right except as lessees.

One S. J. Patterson was the original owner of the land in question. In January, 1890, he contracted to sell and convey it to H. Anderson, the husband of plaintiff. The contract of purchase retained the title in the vendor until the purchase price was fully paid, when a warranty deed was to be executed to the vendee. Anderson, with his wife and family, went into possession of the land, made improvements thereon, and paid about five hundred dollars of the purchase price, which was two thousand one hundred and twenty dollars. In May, 1894, Anderson agreed to sell the land to one Cosman, and the contract of purchase was surrendered to Patterson, and marked "surrendered, and canceled." Patterson then conveyed the land to Cosman, who leased it to Anderson for one year for one-third of the crop. Plaintiff set up a homestead right in the land, claiming that she never joined with her husband in a conveyance thereof or relinquished her homestead rights therein. Plaintiff's petition was dismissed by the trial court, and she appealed.

R. S. Van and Shaw & Kuehnle, for the appellant.

J. P. Connor and McKenzie, Brockett & Dewey, for the appellees.

²⁶⁸ GRANGER, J. It is proved by section 1990 of the code of 1873, as to homesteads, that "a conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Plaintiff bases ²⁶⁹ her right to relief on the fact of a homestead right in the premises, and the provision of the code above quoted. There can be no question but that a homestead right may exist in land leased, or sold under contract, where the legal title remains in the vendor: *Pelan v. De Bevard*, 13 Iowa, 53; *Stinson v. Richardson*, 44 Iowa, 373; *Belden v. Younger*, 76 Iowa, 567. And it may be conceded that the plaintiff and her husband had a homestead right in the land in controversy, modified by the terms of the lease, which gave all the right plaintiff or her husband possessed. It may also be conceded that, had the husband desired to convey the land, in a legal sense, it could not have been done except by the concurrence of the wife in the way provided by law. There was never any election on the part of Patterson to forfeit the contract, but, on the contrary, he seemed disposed to extend to Anderson further time to meet his payments and save the land. It was only when Anderson came to Patterson, and desired him to convey the land to Cosman, that there was a talk of canceling the contract. At that time, however,

the agreement was made to surrender and cancel the contract, because Patterson refused to make any conveyance to Cosman while the contract was outstanding. At the time of the sale of the land by Patterson to Cosman, and of the surrender of the contract of sale by Anderson, he (Anderson), in writing, leased the land of Cosman from May 15, 1894, to March 1, 1895, at a rental of one-third of the crop grown on the land; and he occupied the land in pursuance of the lease, and paid the rental agreed upon. As to Anderson, it is not to be doubted that he intended to and did abandon all interest he had in the land, including homestead occupancy. It is said there was also an abandonment by the plaintiff, and the conclusion is sustained by the record. She knew that her husband ²⁷⁰ was not paying for the place as the contract required; that he was trying to dispose of the land; that his title was only by contract requiring payment to secure a title. She had the contract in her possession, or at least it was in a drawer to which she, most of the time, held the key; and, when Anderson called for the contract to be taken to Patterson, she got it for him, knowing what was to be done; and when her husband returned, the same day, he told her what had been done, so that she had knowledge of the surrender of the contract, the conveyance by Patterson to Cosman, and the lease from Cosman to Anderson. She nowhere pretends that she made any objection, and the only reasonable inference is that she acquiesced in what was then thought to be best, because of her husband's inability to pay for the land. After the transaction they occupied the land under the lease (that is, Anderson did), paying the rent, with her actual knowledge of such payments, and under circumstances entirely inconsistent with any claim of right in the land except that of lessee. The rents had been assigned by Cosman to one Way, who collected them; and it is to be said that, if she was not in accord with what had been done, and living on the land only as the wife of a lessee, she was practicing a deceit, for she well knew that the land was held adversely to any other claim, and in good faith. She must have known that her husband had abandoned any homestead right, and she knew equally well that it was supposed she claimed no such right. Deceit is not fairly to be imputed to her. Her acquiescence and participation in the abandonment of all interests in the land except under the lease was in a way not unusual for a wife. It is true that Anderson says she said to him, when he came home with the lease, that she did not want to pay rent, but his testimony is discredited to an extent that it should not be given force in this particular. Again, ²⁷¹ it is not made to appear what was meant

by the expression. It does not appear that she did not want to pay rent because she had or claimed any right in the land. It appears almost conclusively that Anderson could not pay for the land, and any homestead right in it must be lost. This fact, known to her, may well be considered as largely accounting for what appears to have been a mutual understanding between Anderson and his wife that their occupancy after the sale to Cosman was only by virtue of the lease. The case is quite like that of *Bradshaw v. Remick*, 90 Iowa, 409, in which we held there was an abandonment of the homestead by the wife by virtue of an occupancy under a lease.

We think the decree of the district court is right, and it is affirmed.

HOMESTEAD—IN LAND HELD UNDER CONTRACT TO PURCHASE.—One who holds the equitable title to land, under a contract for the purchase thereof, may impress it with a homestead lien the same as if he held the estate in fee, except that it is subject to the claim of the vendor for unpaid purchase money: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158, and note; *Dortch v. Benton*, 98 N. C. 190; 2 Am. St. Rep. 331.

HOMESTEAD—HELD UNDER CONTRACT TO PURCHASE—ABANDONMENT.—Where a homestead is claimed in land held under a contract to purchase, the vendee, if he be a married man, cannot alienate his interest in the land under the contract without joining his wife with him: *McKee v. Wilcox*, 11 Mich. 358; 83 Am. Dec. 743. He holds such contract in trust for the community for the purpose of perfecting the title: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158, and note. As to what constitutes abandonment of a homestead, see monographic note to *Taylor v. Har- gous*, 60 Am. Dec. 607-615.

READ v. STATE INSURANCE COMPANY.

[103 IOWA, 307.]

INSURANCE—ENCUMBRANCES.—A LEASE of a building in which an insured stock of goods is situated, existing at the time that the insurance is placed, is not an encumbrance within a condition in the policy rendering it void if, without written consent indorsed thereon, the property is encumbered by future mortgage or lien.

INSURANCE.—STATUTORY LIENS FOR RENT to accrue, or for unpaid taxes, can invalidate a policy of insurance only when the policy so provides in unmistakable terms.

INSURANCE—LIMITATION OF ACTION.—If a policy of insurance provides that no action shall be maintained thereon unless commenced within six months after the fire, and fixes the time of payment as sixty days after notice and proof of loss are furnished, the six months' limitation does not begin to run until the expiration of the sixty days.

INSURANCE — ARBITRATION — CONDITION PRECEDENT.—A mere provision in a policy of insurance that in the event

of a disagreement as to the amount of the loss, it shall be ascertained by arbitrators, does not make arbitration a condition precedent to the right to recover on the policy.

INSURANCE—ARBITRATION—INDEPENDENT CONTRACT.—A mere provision in a policy of insurance for arbitration in case of disagreement as to the amount of loss is an independent agreement, collateral to the main purposes of the policy. A breach of such provision cannot be pleaded in bar to an action on the policy, though it may support a separate action.

INSURANCE—ARBITRATION—ESTOPPEL.—Either party to an agreement to arbitrate a difference concerning an insurance loss who intentionally prevents or unreasonably delays the stipulated method of adjusting their rights is not permitted to plead failure to arbitrate as a defense to an action subsequently brought on the policy.

INSURANCE—ARBITRATION—ESTOPPEL.—A party whose duty it is to choose an arbitrator to adjust differences concerning an insurance loss must choose an arbitrator who will act with reasonable promptness in naming an umpire, and, in the submission of the dispute, or on his failure so to do, replace him with another, and the other party to the controversy cannot be made to suffer, if without fault, through the inaction of the first party.

INSURANCE—EVIDENCE OF AMOUNT OF GOODS LOST. To ascertain the amount of insured goods in a store at the time of a fire, the insured may introduce in evidence the last invoice previous thereto, the goods bought and amount received on sales in the mean time, and the average profit on such sales.

INSURANCE—EVIDENCE OF LOSS.—In an action on a policy of insurance on a stock of goods, the insured may show that after the fire he tried to sell the damaged goods and what per cent of the cost price he could get therefor.

INSURANCE—EVIDENCE OF LOSS.—If, in an action on a policy of insurance on a stock of goods, evidence of their selling price at retail is admitted to show their value, the expense of making such sales may also be taken into consideration.

INSURANCE—PRACTICE—SPECIAL VERDICT.—Under a statutory provision that a special verdict shall find only the ultimate facts as established by the evidence, special interrogatories, in an action on an insurance policy, calling for the damage to the insured goods in different parts of a store, and the value of those destroyed, are properly refused as calling for the method or elements considered in reaching the ultimate facts.

INSURANCE—MEASURE OF RECOVERY.—In an action to recover for the loss of insured goods the measure of recovery is the actual and reasonable market value of the goods totally destroyed or rendered worthless, together with the amount of damage or depreciation, if any, to the market value of the goods not destroyed or rendered worthless, as considered in relation to the purpose for which such goods are owned and kept.

O. B. Ayres, Earle & Prouty, and McVey & Cheshire for the appellant.

C. Wright and Cummins, Hewitt & Wright, for the appellees.

³⁰⁰ LADD, J. The policy contains a clause concerning the property insured, in these words: "Or if, without written con-

sent hereon, the title of the property is transferred or changed, in whole or in part (except by death of the insured); or if same, or any part thereof, is encumbered by mortgage, lien, contract, or sale, or otherwise, or is assigned for the benefit of creditors; or any existing encumbrance at the time of making application is not set forth in the application; or if there is any other insurance, valid or invalid; or if there is any change in the occupant or occupancy of the premises insured, . . . then, and in every such case, this policy shall be void." The goods insured were in a building leased February 15, 1893, for a term of three years, five and one-half months, at the rental of two hundred and eight dollars and thirty-three cents per month, payable in advance. The policy was issued March 14, 1893, for one year. The fire occurred August 18th following, and this suit was begun March 22, 1895. If, then, the lease constituted an encumbrance on the property, it existed at the time ³¹⁰ the policy issued, and does not come within the prohibition of this clause. There is no room for construction, as the policy, in unambiguous terms, provides that existing encumbrances must be disclosed in the application, and future encumbrances permitted by the company, else it will be void. Nor can any other intention be imputed to the defendant. The greater part of the merchandise of the country is kept in buildings leased for terms, and a lease is not commonly understood to be an encumbrance. In preparing its form of contract, the defendant could not have had in view the invalidity of a large portion of its insurance for which adequate compensation had been received. Nor do the cases relied on sustain the contention now made. The instruments considered in *Peet v. Dakota etc. Ins. Co.*, 7 S. Dak. 410, and *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, are construed to be mortgages, and the rulings rest on that ground alone. It is well settled that such contracts must be strictly construed against the insurer, and a forfeiture avoided, if possible. If the lien for rent to accrue or for unpaid taxes—created by statute—is to invalidate a policy of insurance, it should so provide in unmistakable terms.

2. Was the action barred by the contract of limitation contained in the policy? It will be noticed the suit was begun within six months after the proofs of loss were furnished, but more than that time after the fire. The policy stipulates that "no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or equity unless commenced within the term of six

months next after the fire shall have occurred." In *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, the policy provided that "action shall be commenced within six months next after the loss shall occur." The court held the period began to run when the cause of action had accrued; i. e., sixty days after ³¹¹ the notice and proof of loss had been furnished. This ruling is expressly approved in *Miller v. Hartford Ins. Co.*, 70 Iowa, 704, and finds support in *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 321; 42 Am. Rep. 297; *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459; *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658; 37 Am. Rep. 800; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385. Authorities to the contrary may be mentioned: *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47; *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; 50 Am. Rep. 1; *Virginia etc. Ins. Co. v. Wells*, 83 Va. 736; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *Law v. New England etc. Assn.*, 94 Mich. 266. The policy considered in *McConnell v. Iowa Mut. Aid Assn.*, 79 Iowa, 757, stipulated that no action should be maintained unless "commenced within six months after the happening of the death on account of which the action is brought." The court, through Beck, J., said: "It is a familiar and just rule, recognized by the courts, that a bar created by a statute or by the contract to an action for a breach of its conditions by reason of the lapse of time will not commence to run until the right of action accrues; that is, the plaintiff must have the full time given by the statute or contract after his right of action accrues in which to commence his suit." The action was begun more than six months after death, but within that time after the right of action accrued, and held to be in time. This ruling is approved in *Matt v. Iowa Mut. Aid Assn.*, 81 Iowa, 135; 25 Am. St. Rep. 483. These cases are decisive. The period must be held to have commenced to run sixty days after the notice and proof of loss were furnished the defendant—the time of payment fixed by the policy. Parties may waive the limitation fixed by statute, and adopt one for themselves, if reasonable; but, in cases like this, the time agreed upon will be construed to begin to run when the right of action accrues. That the rule is a wholesome one is illustrated by an examination of many of the cases cited. In some ³¹² of them a strict construction of the language employed would cut off all recovery, and in others leave the time limited within which an action might be brought unreasonably short. In this state the insured has sixty days

within which to furnish the company notice and proof of loss, and may not maintain an action within ninety days thereafter: *Quinn v. Capital Ins. Co.*, 71 Iowa, 615. This would leave one month only within which suit might be brought. The property involved in this controversy was covered by policies issued by twenty-four different companies, and the length of time required to begin so many actions need only be suggested. Were the question before this court for the first time, we might deem it more appropriate for the legislature to establish such a rule; but as it is not inimical to justice, and may well be presumed to have been followed in making contracts throughout the state for many years, we are content to adhere to it. It finds support in *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135; *German Ins. Co. v. Davis*, 40 Neb. 700; *Friezen v. Allemania etc. Ins. Co.*, 30 Fed. Rep. 352. To the contrary, see *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877.

3. Was arbitration a condition precedent to the bringing of this action? The policy contains this provision: "If differences of opinion shall arise between the parties hereto as to the amount of loss or damage, the subject shall be referred to two disinterested and competent men, each party to select one (and, in case of disagreement, they to select a third), who shall, under oath, ascertain, estimate, and appraise such loss or damage separately; and their award in writing shall be binding on the parties hereto as to the amount of loss or damage, but shall not decide the liability of the company under this policy." There ³¹³ is nothing in the policy making submission to arbitration a condition precedent to the payment of the loss or to the maintenance of an action, nor can such a condition be inferred from its terms. The authorities recognize the rule as stated by Sir George Jessel, M. R., in *Dawson v. Fitzgerald*, 1 Ex. 257: "There are two cases where such a plea as the present is successful: 1. Where the action can only be brought for the sum named by the arbitrator; 2. Where it is agreed that no action shall be brought until there has been an arbitration, or that the arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring," etc. This court has recognized the right of parties to bind themselves to make payment of a sum

to be fixed or estimated by an arbitrator or third person: *Flynn v. Des Moines etc. Ry. Co.*, 63 Iowa, 490; *Ross v. McArthur*, 85 Iowa, 203; *McNamara v. Harrison*, 81 Iowa, 486. Also the right to make arbitration a condition precedent to the maintenance of an action: *Zalesky v. Home Ins. Co.*, 102 Iowa, 613. A mere provision in the policy, however, that, in event of a disagreement, the amount of damage shall be ascertained by arbitrators, will not prevent the assured from maintaining an action, unless arbitration is made, by the terms of the policy or necessary inference therefrom, a condition precedent. In such a case the agreement to arbitrate is collateral to the main purposes of the policy—an independent agreement—a breach of which, while it will support a separate action, cannot be pleaded in bar to a suit on the principal contract: *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598; *Reed v. Washington etc. Ins. Co.*, 138 Mass. 572; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419; *Seward v. Rochester*, 109 N. Y. 164; *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. Rep. 752; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514. See *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272. The condition considered in each of the above cases was, in substance, like that set out, and in each adjudged not to require arbitration before bringing suit. In the authorities cited and relied on by appellant, arbitration is either made a condition precedent by the express terms of the contract or by necessary inference therefrom. Here there is no such provision in the policy, and the agreement to arbitrate must be regarded as independent, and repudiated by the beginning of this action. The remedy open to the defendant was not a plea in bar, but in an action for breach of contract to refer to appraisers. The court erroneously ruled that arbitration was a condition precedent.

4. Each party selected an appraiser on August 26, 1893, and these were unable to agree upon an umpire. September 11th, following, defendant replaced the party selected by it with another, but the attempt of these to fix upon a satisfactory person also failed. The plaintiff declared, on the 16th of the same month, it would proceed with the arbitration no further, but afterward said, if there was no delay, the appraisers might proceed with one Redstone as umpire. When it was learned Redstone was about to leave for Chicago, plaintiff refused to submit the matter at all. A great part of the evidence and a very voluminous correspondence between the attorneys was introduced bearing on

the question as to whether the plaintiff was justified in refusing to proceed further with the arbitration. The law seems to be well settled that, if either party to an agreement to arbitrate intentionally prevents or unreasonably delays the stipulated method of adjusting the rights of the parties, he ³¹⁵ will not be permitted to plead failure to arbitrate as defense to an action subsequently brought: *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 380; *Uhrig v. Williamsburgh etc. Ins. Co.*, 101 N. Y. 362. The arbitrator, by whomsoever selected, represents neither party in the work of determining the issues submitted, but is bound to act impartially, and with no other purpose than that of arriving at a just conclusion. In selecting an umpire, he owes no other duty to the party appointing than that of promptly securing an impartial and capable person to act in that capacity. Either party may well be permitted to state valid objections to any person under consideration for such position, but may not control therein, or unduly influence, either arbitrator. If an umpire is not chosen, owing to the interference of either party, with the purpose of preventing or delaying the submission unreasonably, this ought to estop him from pleading no arbitration, because he has rendered it impossible by his own acts. Nor will an arbitrator be permitted, on his own motion, by willfully or negligently postponing the selection of an umpire, to unreasonably delay the adjustment of the controversy; else the very purpose of arbitration, which is the speedy and inexpensive settlement of disputes, would be defeated. A person cannot be tied up forever, without his fault, by an ineffectual arbitration. It is better to hold the party appointing to the duty of choosing an appraiser who will act with reasonable promptness in naming an umpire, and in the submission of the dispute, or, on his failure so to do, replace him with another, than that the other party to the controversy shall suffer without any fault of his own. This is not in conflict with the rule that, when the award is set aside because of misconduct of arbitrators, a new appraisement, if not impossible, will still be necessary: See *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; ³¹⁶ *Hiscock v. Harris*, 80 N. Y. 402; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297. Here, there is a failure to act at all, and a party may well be required to name an appraiser who will proceed to the performance of his duties as such without unnecessary delay. The instructions of the district court were in harmony with these views, and are approved as correctly stating the law: See *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572.

5. The defendant urges that the finding of the jury that Kenyon, the appraiser selected by it, unreasonably delayed the choice of an umpire, is not sustained by the evidence. We shall not take the trouble to determine this, for the reason that, had the finding been different, the plaintiff would have been entitled to recover. The only question proper for the consideration of the jury was the amount of damages to be allowed. In requiring the plaintiff to establish an excuse for failure to arbitrate, the court imposed an additional affirmative issue on it to establish; but this was insisted on by the defendant, and many instructions asked by it submitting that issue, so that it is not in a situation to complain of any prejudice occasioned by the holding of the court that arbitration was a condition precedent. Nor did any result. The court correctly instructed on that issue, and, by submitting it to the consideration of the jury, announced the law as more favorable to the company than it was entitled to have it. The defendant was not prejudiced by the ruling that plaintiff must prove more than the law required: See *Phoenix v. Lamb*, 29 Iowa, 352; *Hahn v. Miller*, 60 Iowa, 96; *Miller v. Root*, 77 Iowa, 545.

6. It is also insisted that the finding of the jury that the damage to the stock of goods occasioned by the fire was thirty-four thousand dollars has not sufficient support in the evidence. The testimony of Read and ³¹⁷ Traversy warranted this finding. Other reputable witnesses placed the damages at only a fraction of such amount. The value of the evidence offered depended very largely on the familiarity of the witnesses with the goods, and the attention given to them before and after the fire. While we might not have placed the damages as high as the jury did, the evidence is such as to preclude any interference with the verdict.

7. For the purpose of ascertaining the amount of goods in the store at the time of the fire, the plaintiff was permitted to show the last previous invoice, the goods bought in the meantime, the amount received on sales in the mean time, and the average profit on such sales. Of this the defendant seriously complains, but suggests no other way of fixing the value of the merchandise before the injury. It is the usual way of determining such value, and often the only method of fixing the damage in event of the partial or total loss of a large and miscellaneous stock of merchandise. If the statements and computations are correct, a comparison with the amount and value of the goods immediately after the fire will fix the loss suffered

thereby: See *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Insurance Co. v. Weide*, 9 Wall. 677; *Insurance Co. v. Weides*, 14 Wall. 375. The possibility of a great many other dispositions of the property is suggested by counsel, but the evidence tended to show none other had been made. So with reference to other causes of depreciation. These were undoubtedly the subject of inquiry, and the defendant had the opportunity of calling them to the attention of the jury either in cross-examination or by such evidence as it might deem proper to offer.

8. Read testified that after the fire he tried to sell the damaged goods, and was asked what per cent ³¹⁸ of the cost price he could get. It is said that this was improper, because the cost price might not represent the true value, as the goods may have depreciated by being shelf-worn, or out of style, and for other reasons. It is sufficient to say that the examination followed the well-known custom of merchants generally in making all computations from the cost price; and, had there been any depreciation owing to the numerous causes suggested, the defendant had ample opportunity for developing them on cross-examination.

9. In cross-examination Read testified that of the stock twenty-four thousand four hundred and ninety-six dollars and eighty-two cents was received for goods sold between September 25, 1893, and March following, and merchandise invoicing seventeen thousand dollars then remained. The evident purpose was to show that the goods actually sold for more than the value fixed by him. The plaintiff, in redirect examination, was then permitted to show the cost incurred in making these sales. Certainly, if the selling price at retail may be considered in fixing the value, the expense of making such sales ought to be taken into consideration. The defendant, having elected to enter such investigation, cannot be heard to complain because followed into the same field of inquiry.

10. Special interrogatories, calling for the damage to goods in different parts of the store, and the value of those totally destroyed, were asked by the defendant, and refused. The ruling was not erroneous, as the inquiries were not for ultimate facts material to the issue. It was simply an attempt to require the jury to state the different items of damage resulting from the same cause, making up the amount of their verdict. A special verdict must present the ultimate facts as established by the evidence: Code 1873, sec. 2807. "Ultimate," as defined by Webster, means: "Last ³¹⁹ in the train of progression or conse-

quences; tended toward by all that precedes; arrived at as the last result; final." The fact to be found must be one inhering in and necessary to determine in arriving at the general verdict. The method or elements considered in reaching the ultimate facts cannot be called for by special interrogatories: See *Lawson v. Chicago etc. Ry. Co.*, 57 Iowa, 672; *Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa, 334; *German Sav. Bank v. Citizens Nat. Bank*, 101 Iowa, 530; 63 Am. St. Rep. 399; *Phoenix v. Lamb*, 29 Iowa, 302; *Hawley v. Chicago etc. Ry. Co.*, 71 Iowa, 717; *Scagel v. Chicago etc. Ry. Co.*, 83 Iowa, 380; *Dreher v. I. S. W. Ry. Co.*, 59 Iowa, 599.

11. The seventh instruction is not open to the criticisms urged, but contains a clear and full statement of the correct measure of damages. The jury are there told, in substance, to determine the reasonable market value of the goods totally destroyed or rendered worthless, and then the amount of the damage or depreciation, if any, to the market value of the goods not destroyed or rendered worthless, and, in doing so, to consider the purposes for which plaintiff owned and kept the merchandise; and, after cautioning the jury only actual damages could be allowed, proceeded: "You are instructed that, if the goods insured could not, in ordinary course of trade or business, be sold at as high prices after as before the fire, such difference was an actual damage, for which the plaintiffs are entitled to recover; and the aggregate of these sums will be the amount of plaintiffs' loss or damage." It is said the measure of damages is the difference between the market value of the goods immediately before and after the fire. That is what the court told the jury. The fair market value is what property will bring in the ordinary course of trade or business. It is claimed depreciation from other causes might be considered under this instruction. But, in stating the issues, the jury were told that damages occasioned by fire were claimed, ³²⁰ and such damages only were under consideration. If the goods decreased in value from cost from other causes, this would be taken into account in determining what they were worth at that time. All the evidence was directed to fixing the value before and after the fire. The jury could not have failed to understand this instruction to mean all defendant claims it should.

12. Many other matters are discussed, but do not require consideration. The arguments of appellant are prolix, and many of the objections urged are captious. Without reviewing them in detail, we may say they are without merit.

The judgment is affirmed.

INSURANCE—ARBITRATION AS COLLATERAL AGREEMENT—WAIVER.—If an insurance policy contains, first, an agreement to pay a loss within a certain time; and, secondly, an agreement to refer the loss to arbitration, the agreement to arbitrate is collateral to the agreement to pay: *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419; 62 Am. St. Rep. 47. Where the number of arbitrators is not specified, nor the mode of selecting them, although it is provided that no action against the company shall be sustained unless an award shall first have been returned, arbitration is not a condition precedent to a suit on the policy: *Aetna Ins. Co. v. McLead*, 57 Kan. 95; 57 Am. St. Rep. 320, and note. The right to insist upon arbitration may be lost or waived by either party: *Moyer v. Sun Ins. Office*, 176 Pa. St. 579; 53 Am. St. Rep. 690; *Home Fire Ins. Co. etc. v. Kennedy*, 47 Neb. 138; 53 Am. St. Rep. 521; *Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372; 55 Am. St. Rep. 231.

INSURANCE—ENCUMBRANCES—LIENS.—A covenant in a lease providing that the lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes does not create a chattel mortgage, within the meaning of a condition in a policy of insurance on such buildings that it shall be void if the buildings "be or become encumbered by a chattel mortgage": *Caplis v. American Fire Ins. Co.*, 60 Minn. 376; 51 Am. St. Rep. 535. As to whether a similar condition against liens includes those created by operation of law, as well as those arising from contract, see *Capital City Ins. Co. v. Autrey*, 105 Ala. 269; 53 Am. St. Rep. 121; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393. Compare with the principal case, *Aetna Ins. Co. v. Resh*, 44 Mich. 55; 38 Am. Rep. 228.

INSURANCE—CONSTRUCTION OF CONTRACT—LIMITATIONS OF TIME FOR BRINGING ACTION.—A condition in a fire insurance policy requiring an action for a loss thereunder to be brought within twelve months next after the fire must be construed in connection with other conditions providing that the loss shall not become payable until sixty days after notice and proof of loss, and that no suit shall be maintained on the policy until after full compliance by the insured with all of its requirements. Under such a policy, the insured has a right to bring suit to recover for a loss at any time within twelve months after the accrual of the right of action, regardless of the time of the fire and loss: *Sample v. London etc. Fire Ins. Co.*, 46 S. C. 491; 57 Am. St. Rep. 701, and note showing a conflict of opinion upon this point; *Egan v. Oakland Ins. Co.*, 29 Or. 403; 54 Am. St. Rep. 798, and note.

INSURANCE—MEASURE OF RECOVERY.—The measure of recovery for the loss of goods insured against fire is the market or cash value of the goods at the time and place of the fire: *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62. The ledger and cash-book of the insured may, in some cases, be received in evidence: *Jones v. Mechanics' Fire Ins. Co.*, 36 N. J. L. 29; 13 Am. Rep. 405.

HUBNER v. REICKHOFF.

[103 IOWA, 368.]

NAMES—IDEM SONANS—NOTICE BY PUBLICATION.—

The name "Keesel" in a summons, when service in an action for divorce against a nonresident is by publication, cannot be assumed to be understood as the same as "Keisel," the defendant's real name, and a default decree based on such service is void.

Haines & Lyman, I. S. Struble, and G. W. Pitts, for the appellant.

Argo & McDuffie, for the appellee.

³⁶⁸ GRANGER, J. 1. It became necessary for the plaintiff, in order to show a valid marriage contract with William Reickhoff, to establish a divorce from Heindrick Keisel, to whom she had been married. She ³⁶⁹ had left him in Germany, and she presented to the court a certified copy of a decree from the district court of Nebraska in and for Douglas county, showing a divorce of Amanda M. Keisel from Heindrick Keisel, on the second day of September, 1888. The decree shows that jurisdiction was obtained by a service of notice by publication. In support of the objections to the decree, as evidence, the defendant presented the record, from which proof of service must be found. The notice was addressed to Heindrick Keesel, signed by "Amanda M. Keesel, by J. E. Smith, Attorney." The notice, as shown of record, required the defendant to appear and answer on or before December 26, 1888. It is argued by appellant as if it was 1887; and, as appellee makes no question as to the fact, we will consider 1887 as the proper date. It appears that the decree was entered, on default of the defendant, on the second day of November, 1888. The affidavit for publication was filed November 4, 1887, and that of publication October 13, 1888, showing the publication to have been from November 12 to December 3, 1887. The cause seems to have been continued from the return day, December 26, 1887, to November, 1888, before default or judgment was entered.

The court instructed the jury that the decree as offered was prima facie evidence of a divorce, and the decree was admitted in evidence against numerous objections as to its competency. The question of fact, as to the residence of plaintiff in Nebraska for such time as to give jurisdiction, the court submitted to the jury, with the instruction as to the prima facie effect of the decree. Among the objections urged then and now to the decree is the variance in name between that of plaintiff's husband,

"Keisel," and that in the notice, "Keesel." It is urged that the variance is fatal to the decree. The following rule is invoked by appellee, found ³⁷⁰ in 16 American and English Encyclopedia of Law, 122: "The absence of a definite set of rules for the spelling and pronunciation of the names of persons, and more especially of surnames, has led the court to the adoption of a principle known as the rule of idem sonans. This rule may be stated to be that absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error." The author has collected a very extended list of names to which the rule has been applied, and another to which it is held not applicable. In some cases it has been held that the question of whether the rule is applicable is one of fact for the jury, and in others that the issue presents a question for the court. We have examined many, but not all, of the cases cited by the author, and from them no very definite rule can be gathered. Many of the cases are criminal, and the question is one of identity of the person charged with the person on trial, and many others present the question of the identity of the person in court, sought to be charged with an obligation or duty, with the one named in an instrument or document. It is, in such cases, a question whether the person against whom the adjudication is sought is the one represented by the name in the instrument. The reasonableness of the rule in such cases is apparent. An examination of the cases will show that the variance in orthography in names has been held fatal or otherwise, as the facts of the case would warrant, having in view safety in the application of the rule, and just results. ³⁷¹ This case is unlike any that we have seen. It is conceded that the name "Keisel" is pronounced by giving to the diphthong the long sound of "i." If that pronunciation is to obtain for the purpose of the case, the rule of idem sonans could not be made to apply; and, so far as can be known, it is a fact that it was so pronounced. But, if the sound of long "e" should be permitted, ought the rule to obtain in this case? The test suggests this query: Where a service is by publication, which is made conclusive because of a presumption that it comes to the notice of

the person, can the court assume as a matter of law that the name "Keesel" would or should be understood as "Keisel"? Can it be said to be a rule of law that one of the latter name, on seeing the former name in a notice, must or should understand it to mean him? Let it be conceded that, if he were in court, the identity of the person as the one intended might be shown; but can it be assumed as a legal conclusion that "Keesel" should be understood as "Keisel"? It is hardly to be doubted that, while "Reed" could be held to apply to "Read" or "Reade," with the person in court, and an issue of identity made, a court would not assume, in a publication service, that it meant, or should be understood to mean, either of the others. The danger of such a holding is apparent, because of the fact that all three words are names of persons pronounced alike, but of different orthography. Under some conditions either name might be held to apply to either of the persons, but not in a case where a name, not his own, is published in a notice, to which he has not responded, and the failure to respond is to be taken as a confession of the truth of charges, as the record recites in the divorce proceeding. The corrupt practices in divorce proceedings could hardly be aided by the courts better than to open the door for a variance between the actual name of the defendant in the record and that in the notice constituting the service, and giving the court ³⁷² jurisdiction. It would seem as if the dissolution of the marriage relation should depend on greater accuracy of procedure than a variance involving such doubt and uncertainty. The divorce case, on the face of the record, is strange in the respect of the defendant's name, if not somewhat suspicious. The plaintiff was a person of the same name, and of course, knew it well. In the proceedings the name appears as "Keisel" and "Kiesel," which is a mere reversal of the letters of the diphthong; but nowhere, except in the notice, does the name appear as "Keesel," which is enough of a departure to indicate another name. As we understand the record, the published name is neither spelled nor pronounced like that of the defendant in the divorce proceeding. But if pronounced the same, and if under some circumstances, such as we have suggested, the variance in spelling might be held immaterial, we do not think the rule can be made to apply in this case, where the defendant was not in court, and there could have been no issue or facts from which he should be held to answer to a name not his own, or be adjudged in default. The decree in evidence and the instructions of the court were conclusive on the question,

and the effect was to hold, as a matter of law, that the person named in the notice was the husband of the plaintiff, and we do not think the conclusion was warranted. We think, with this affirmative showing, the decree should have been denied as evidence, on the ground that the person served did not appear to be the person named in the proceeding.

This question being jurisdictional, it cannot well be claimed that the decree in the divorce proceeding is conclusive against collateral attack. If the substituted service was not, as a legal conclusion, on Heindrick Keisel, there was an entire want of jurisdiction, and the decree is absolutely void, and may be attacked in ³⁷³ any proceeding in which it is sought to be made effective: 1 Black on Judgments, sec. 170; *Jordan v. Brown*, 71 Iowa, 421. It is not a case of a defective service of notice, but one of no service on Heindrick Keisel. In such a case a foreign judgment is void, notwithstanding the recitals of a service: *Stone v. Skerry*, 31 Iowa, 582. An entire want of notice is not a defective notice: *Haws v. Clark*, 37 Iowa, 355.

We are better satisfied with our conclusion because of the fact that the record is not an affirmative showing of good faith in the divorce proceeding in Nebraska. The court submitted to the jury the question of a timely residence of plaintiff in Nebraska, so as to give jurisdiction to that court; and the jury found there was such residence, but upon evidence of very doubtful sufficiency. Conceding it to be of such a nature as to sustain the finding, its doubtful character, in connection with the mode of service, which we hold to be insufficient, makes it a case with no equitable features to make the application of the rule as to service appear harsh or in any way unjust. Because of the conclusiveness of the question we have considered, it is not important that we consider others.

The judgment is reversed.

Kinne, C. J., took no part.

NAMES — IDEM SONANS — INSTANCES.—If two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial: *Pitnogle v. Commonwealth*, 91 Va. 808; 50 Am. St. Rep. 867, and note; *Heil's Appeal*, 40 Pa. St. 453; 80 Am. Dec. 590. For instances of names held to be and not to be idem sonans, see *Geer v. Missouri Lumber etc. Co.*, 134 Mo. 85; 56 Am. St. Rep. 489; *Miltonvale etc. Bank v. Kuhnle*, 50 Kan. 420; 34 Am. St. Rep. 129; *Collins v. Ball*, 82 Tex. 259; 27 Am. St. Rep. 877, and notes thereto.

McNEELY v. FORD.

[103 IOWA, 508.]

USURY—AGENCY—RATIFICATION.—Notes given a wife are usurious, where her husband acts as her agent in loaning the money on such terms as he chooses, and he adds to the amount of such notes, in excess of the money loaned, a certain sum as his commission, which, together with the interest stipulated for, makes the interest exceed the lawful rate, and the wife ratifies the notes by demanding a recovery of the whole amount.

J. M. Whitaker, for the appellant.

H. Stone, for the appellee.

509 GIVEN, J. 1. We first inquire whether the promissory note sued upon is usurious. The facts out of which its execution grew are these: Plaintiff is the wife of G. W. McNeely, who has been engaged in the loan business. At the time of their marriage in 1885, the plaintiff had three or four hundred dollars, which had been given to her by her father, and which she placed in the hands of her husband to be loaned. Mr. McNeely placed in her name a sufficient amount of notes owned by him to increase the amount in his hands for her to one thousand dollars. This money was left in his hands to be invested for the plaintiff. On March 21, 1890, the defendant applied to Mr. McNeely for an immediate loan of money, to enable him to redeem his property from an execution sale, the period of redemption of which expired that day. Defendant on that day executed his promissory note, payable to the plaintiff, for six hundred and forty-two dollars, payable March 21, 1891, with ten per cent interest, for which he received from Mr. McNeely six hundred dollars. Defendant testifies that the forty-two dollars were added as illegal interest. Mr. McNeely testifies that forty dollars of it were added as his commission, to which defendant had agreed. Certain payments were made and credited upon this note. On March 21, 1891, defendant executed his other promissory note for the sum of one hundred and seven dollars and seventy-five cents, payable to the plaintiff, January 1, 1892, with eight per cent interest, for which he received ninety-seven dollars and fifty cents in money from Mr. McNeely. Defendant testifies that the ten dollars and twenty-five cents were retained as illegal interest, while Mr. McNeely testified that they **510** were for the expense of making and recording the chattel mortgage given to secure the note, and that it was put in the note at defendant's request. On March 25, 1892, the defendant ex-

ecuted his other promissory note to plaintiff for fifteen dollars, payable in sixty days, with eight per cent interest. Defendant testifies that this was given for additional illegal interest on the first note. Mr. McNeely testifies that it was to pay the costs of extending the six hundred and forty-two dollar note. On April 1, 1892, defendant executed to plaintiff another promissory note for one hundred and eight dollars, payable November 1, 1892, with ten per cent interest. Defendant testifies that he only received ninety-seven dollars and fifty cents on this note, which is not disputed nor explained by Mr. McNeely, but he says that it was a clerical error that makes the note draw ten per cent interest, and that it should have been only eight per cent. On March 28, 1893, the note sued upon was given for the balance appearing to be due upon these several notes, according to the face thereof, less credits appearing thereon. Defendant testifies that Mr. McNeely and Mr. Forrey figured the amount due upon these notes to be seven hundred and fifty dollars, and that twenty dollars were added as usury, making the note seven hundred and seventy dollars. Mr. McNeely testifies that the twenty dollars were added on account of his day's travel and expenses in going to St. Anthony to see the defendant, and for the settlement and for the recording and execution of the mortgages. We will not discuss this evidence further than to say that it leaves no doubt that in these transactions Mr. McNeely acted solely as the agent of the plaintiff, and was not entitled to any commission from the defendant for effecting a loan, and that the several amounts added to the promissory notes over and above the amount received by defendant were usurious.

511 2. Plaintiff cites and relies upon *Greenfield v. Monaghan*, 85 Iowa, 211, and *Richards v. Purdy*, 90 Iowa, 502, 48 Am. St. Rep. 458. In both those cases the excess over the amount actually loaned was retained by the agent solely for his own benefit, without the knowledge of the party whose money was loaned; and there was no evidence that his act in so doing was authorized or ratified by the person whose money he was loaning. In the *Greenfield* case it is said: "We find no direct evidence that the plaintiff authorized or knew that Griswold was exacting a commission from Monaghan; and it is the well-settled rule in this state that, when a charge is made by the agent for his own benefit in excess of the authorized rate of interest, the transaction is not tainted with usury if the principal did not authorize the charge": Citing cases. It is further said: "Proof that the agent for the person lending the money retained a por-

tion of it for his own use, which, if for the benefit of the principal, would make the loan usurious, is not proof of usury, because the transaction may be entirely legal; and for that reason the law will presume that it was so. Therefore, in order to sustain the plea of usury, it is necessary for the borrower to show, not only that the agent has retained, from the sum loaned, money sufficient to make the amount the borrower is required to pay, if for the benefit of the principal, greater than that sanctioned by law, but also that the act of the agent in retaining money was authorized or ratified by the principal. In this case the defendants failed to show that Griswold had authority to retain the commission, that the plaintiff knew that it had been retained, or that he derived any benefit from it." This case was followed in *Richards v. Purdy*, 90 Iowa, 502; 48 Am. St. Rep. 458. In that case the agent making the loan was also agent for the borrower. In this case Mr. McNeely acted solely as the agent of his wife, and, though she testifies that she never authorized ⁵¹² him to receive more than legal interest, we are satisfied that it was intended and understood between them that he should invest her money upon such terms, as to interest and otherwise, as he might see fit. He testifies: "She gave it to me to make investments, and I invested it as best I could. I never consulted her in making these loans; never had to when I put out any money for her. Of course, she did not ask any questions." He also says that she trusted to his judgment and experience to invest the money. She testifies that he was her agent for loaning the money, and that "I would ratify whatever he would do." The six or seven hundred dollars contributed by Mr. McNeely to make the one thousand dollars were never in the possession nor control of the plaintiff. In view of the relation of the plaintiff and her agent and of the other facts, we are satisfied that the plaintiff expected him to loan the money upon whatever terms, as to interest and otherwise, he might see fit. We are in no doubt that they intended that she should have the full benefit of all that might be realized from loaning this money. If it may not be said that he had authority from the plaintiff to take usurious interest, it is certainly clear that what he did take was not for his own, but for her, benefit. The excess over the amounts actually loaned were in each instance included in notes payable to the plaintiff, and in this action she is asking to recover these amounts. Mr. McNeely fails to show in his testimony that his accounts with his wife were so kept as that these excesses were for his benefit, and not

for hers. The rule quoted above is grounded on the facts, not only that the excess or usury was taken without the authority or ratification of the person for whom the loan was made, but that it was taken for the benefit of the agent, and not for the benefit of the principal. In this case we think it entirely clear that it was taken for the benefit of the principal, this plaintiff, and ⁵¹³ that she accepts and ratifies the act now by demanding recovery therefor.

The judgment of the district is affirmed.

USURY—COMMISSIONS PAID LENDER'S AGENT.—A loan negotiated by an agent for both parties, and bearing legal interest on its face, is not rendered usurious by the act of the agent in taking a commission note for his services payable to the lender, thus raising the total interest above the legal rate, provided the lender neither authorizes nor ratifies the act of the agent: *Richards v. Purdy*, 90 Iowa, 502; 48 Am. St. Rep. 458, and note. But if the lender, when making the loan, knows that a bonus or commission is being paid to his agent for services not rendered to the borrower, and that such payment increases the cost of the loan to the borrower beyond the amount allowed by law, the lender, though no part of the moneys so exacted are received by him, is deemed to have been a guilty participant in a usurious transaction: See monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 198, 199; also, *Pottle v. Lowe*, 90 Ga. 576; 59 Am. St. Rep. 246, and note.

BROWN SHOE COMPANY v. HUNT.

[103 Iowa, 586.]

INNKEEPERS—LIEN ON GOODS OF THIRD PERSON.—A statutory lien given to innkeepers on all property "belonging to or under the control of their guests which may be in such hotel" attaches to samples and their receptacles carried by a traveling salesman, although the innkeeper knew at the time that he received the salesman as a guest that the samples did not belong to him, but to his employer.

CONSTITUTIONAL LAW—INNKEEPERS' LIENS.—A statute giving to innkeepers a lien on all property "belonging to or under the control of, their guests which may be in such hotel" is not unconstitutional as depriving the owner of his property without due process of law. The statute simply provides for a lien and a possession without making provision as to how the lien shall be enforced.

Lynn & Foley, for the appellant.

S. J. Quincy, and Wright & Hubbard, for the appellee.

⁵⁸⁷ **KINNE, C. J.** 1. This cause was determined upon the following agreed statement of facts: "This is an action in replevin, in which the Brown Shoe Company, a corporation or-

ganized under the laws of the state of Missouri, is plaintiff, and Frank Hunt, of Sioux City, Iowa, is defendant. That immediately prior to and within the last two years before the commencement of this action, the defendant was the agent and general manager of and for Lola M. Hunt, the proprietor of the New Oxford Hotel, in Sioux City, Iowa. That said hotel was kept for the general accommodation of the general traveling public. That one M. K. Sheehan applied for and was furnished meals, lodgings, extras, and accommodations usually furnished the general public at inns and hotels as a guest of said hotel, which said accommodations were furnished by defendant. That said accommodations so furnished were of the value of sixty-eight dollars and sixty cents, all of which remains due and unpaid. That, at the time the accommodations for which defendant claims a lien were furnished to the said M. K. Sheehan, the said Sheehan was the authorized traveling agent and salesman of the plaintiff and engaged in the prosecution of its business; and that the goods described in plaintiff's petition, and taken under the writ of replevin herein, were the samples of stock and the cases containing the same furnished by the plaintiff to the said M. K. Sheehan, for his use in the prosecution of the plaintiff's business. That the amount ⁵⁸⁸ charged against the said M. K. Sheehan, and for which defendant claims a lien upon the goods in controversy, is the fair and reasonable price of the accommodations furnished by the defendant to the said M. K. Sheehan. That at the time the said M. K. Sheehan became a guest of said hotel, the property and goods described in the petition were in his actual possession and under his control in said hotel, and remained in his possession and under his control in said hotel up to the time when said M. K. Sheehan departed therefrom, and said goods and chattels remained at said hotel until the same were taken under the writ of replevin issued in this action. That the defendant took possession of said goods and chattels described in the petition, and held possession thereof as security for the accommodations furnished to said M. K. Sheehan at said hotel as a guest thereof, and does not claim to have any other or further interest in said goods and chattels except that defendant claims he is entitled to a lien thereon for the value of the accommodations so furnished to the said M. K. Sheehan, under the statutes of this state. That the said goods and chattels were such at all times the property of plaintiff, and were at the time the said defendant took possession thereof. That plaintiff's ownership of said goods was

well known to the defendant while said M. K. Sheehan was a guest at said hotel, and at the time he took possession of the same. That the plaintiff, before the commencement of this action, demanded the possession of said goods and chattels. That the value of said property is as stated in the petition. That the goods and chattels described in plaintiff's petition were taken under the writ of replevin in this action, and delivered to the plaintiff, and have ever since remained in the possession of the plaintiff. That in case the plaintiff recovers in this action, it is entitled to the possession of said property, and judgment against the ⁵⁸⁹ defendant for costs. That in case defendant prevails in this action, he is entitled to a judgment against the plaintiff, and upon the replevin bond filed in this action and the securities thereon, to the amount of sixty-eight dollars and sixty cents, and costs of this action." The cause was tried to the court and a judgment entered in favor of the defendant, and against the plaintiff, for sixty-eight dollars and sixty cents, and for costs, from which plaintiff appeals.

2. Our statute provides: "All hotel, inn, or eating-house keepers, shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn, or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the proper and reasonable charges of such hotel, inn, or eating-house keeper against such guest, and the cost of enforcing the lien thereon": Acts Eighteenth General Assembly, c. 181, sec. 2. It appears from the statement of facts that defendant knew that the goods upon which he claims a lien did not belong to his guest, but were the property of the plaintiff. It is therefore contended that his innkeeper's lien did not attach to them. Counsel cite several cases in support of such contention. They were cases where the lien claimed was the common-law lien, and not one created by the statute. This applies also to the claim that the goods were not of such a character as to be considered as for the convenience or comfort of the guest, but rather such as enabled the guest to carry on a trade, or business. The common-law doctrine that the innkeeper could have no lien as against the property of third parties, he knowing their ownership when he received ⁵⁹⁰ the guest and the property, has been changed by our statute. Under our

statute, the innkeeper may "take and retain possession of all baggage and other property belonging to or under the control of their guests, which may be in such hotel or inn." Clearly, the legislature intended by the words used to give a lien, not only upon the property in fact belonging to the guest, and which was in the hotel or inn, but likewise a lien upon property placed therein which was under the guest's control. The guest in this instance was a traveling man, selling goods by sample, and the lien is claimed upon these sample goods and the receptacles in which they were contained. These goods were used in the prosecution of his business as a salesman. The nature and character of his occupation was such that plaintiff must be held to know he would be compelled to stop at hotels or inns, and that, in the proper prosecution of his avocation, he would need his sample goods in such hotels or inns. The statute clearly covers such goods as they were, under the control of the guest.

3. The statute is not unconstitutional. It does not deprive the owner of his property without due process of law. It simply provides for a lien and a possession, and makes no provision as to how the lien shall be enforced.

The judgment below is affirmed.

INNKEEPER'S LIEN—PROPERTY IN POSSESSION OF BUT NOT OWNED BY GUEST.—An innkeeper's lien on property intrusted to him to be kept depends upon the question whether it was the property of one who was a guest of such innkeeper, actually or constructively: *Grinnell v. Cook*, 3 Hill, 485; 33 Am. Dec. 663, and note. It has been held that with reference to this lien there is no distinction between the goods of a guest and those of a third person brought to an inn by a guest: Extended note to *Cook v. Kane*, 57 Am. Rep. 32. But, generally, notice to the innkeeper that the guest does not own property in his possession deprives him of his lien thereon: *Singer Mfg. Co. v. Miller*, 52 Minn. 516; 38 Am. St. Rep. 568; *Cook v. Kane*, 13 Or. 482; 57 Am. Rep. 28.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The questions as to what constitutes due process of law, and when a statute is unconstitutional as depriving one of rights without due process of law, are discussed in the monographic notes to *Bank of State v. Cooper*, 24 Am. Dec. 537-545, and *Bardwell v. Collins*, 20 Am. St. Rep. 554-559.

NEASHAM v. McNAIR.

[103 Iowa, 695.]

FAMILY EXPENSES—LIABILITY OF WIFE.—A diamond shirt stud worn by the husband for personal use and adornment is a family expense for which the wife may be liable under a statute which makes the property of husband and wife, or of either of them, liable for family expenses.

Work & Lewis, for the appellant.

W. S. Coen, for the appellee.

⁶⁹⁵ LADD, J. Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense ⁶⁹⁶ of the family, for which the wife may be liable? Section 2214 of the code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law, the husband was liable for any expense incurred in the clothing and maintenance of the wife and children, suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. The wife, however, was not chargeable for necessaries, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessaries, and affords an adequate remedy against both husband and wife: *Smedley v. Felt*, 41 Iowa, 588; *Schrader v. Hoover*, 80 Iowa, 243; *Blachley v. Laba*, 63 Iowa, 22, 50 Am. Rep. 724; *Devendorf v. Emerson*, 66 Iowa, 698. The expense, however, is limited to that of the family, and must have been incurred for something used therein, or kept for use of or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment: *Fitzgerald v. McCarty*, 55 Iowa, 702; *Smedley v. Felt*, 41 Iowa, 588. In the latter case, a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home, under one head or manager: *Menefee v. Chesley*, 98 Iowa, 55, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense.

Clothing ⁶⁹⁷ seems to have been treated as such: *Finn v. Rose*, 12 Iowa, 565; *Devendorf v. Emerson*, 66 Iowa, 698; *Smedley v. Felt*, 41 Iowa, 588. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table. Indeed, the services of a physician to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only: *Schrader v. Hoover*, 80 Iowa, 243; *Marquardt v. Flaughter*, 60 Iowa, 148. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such: *Brown v. Edmonds*, 8 S. Dak. 271; 59 Am. St. Rep. 762; *Stewart v. McClung*, 12 Or. 431; 53 Am. Rep. 374; *Bumpus v. Maynard*, 38 Barb. 626. Contra, see *Smith v. Rogers*, 16 Ga. 480; *Rothschild v. Boelter*, 18 Minn. (*361) 331; *Gooch v. Gooch*, 33 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 252. See 29 Am. & Eng. Ency. of Law, 38. In *Sawyer v. Sawyer*, 28 Vt. 252, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the supreme court of New Hampshire adjudged a breastpin "not to be wearing apparel necessary for the debtor and his family": *Towns v. Pratt*, 66 Am. Dec. 726. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the persons from exposure, and not articles of ornament merely. Originally, it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person, there appears no good reason for not adjudging it ⁶⁹⁸ a part of the wearing apparel; else much that is pleasing in dress must be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were often adjudged necessities for which the husband was liable at common law: *Raynes v. Bennett*, 114 Mass. 424; *Porter v. Briggs*, 38 Iowa, 166; 18 Am. Rep. 27.

These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining ⁶⁹⁹ whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk hat. The article may be unnecessary, or such as a family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided: *Dodd v. St. John*, 22 Or. 250. If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no inconsiderable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actually used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor.

Reversed.

HUSBAND AND WIFE—FAMILY EXPENSES—LIABILITY OF WIFE.—It has been held that where a husband is not able to support his wife and her children, her separate property may be resorted to and made liable for that purpose; and this in the absence of any statute imposing such liability: *Callahan v. Patterson*, 4 Tex. 61; 51 Am. Dec. 712. She is similarly liable when necessities for herself and family are sold on the credit of her estate: *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695, and note. Where a statute imposes upon the wife a liability for family expenses which is a mere counterpart of the liability therefor imposed by the common law upon the husband, there can be no reason why the words “necessaries” or “family expenses” should not have the same meaning under the statute that they had at common law. And in the latter case the criteria by which to determine what are necessities are the condition in life and social position of the husband: See monographic note to *Cunningham v. Irwin*, 10 Am. Dec. 462; *Bergh v. Warner*, 47 Minn. 250; 28 Am. St. Rep. 362, and note; *Baker v. Carter*, 83 Me. 132; 23 Am. St. Rep. 764, and note.

STATE v. DOTY.

[103 IOWA, 1899.]

OBSCENE PICTURES—SALE OF.—A photographer who takes the picture of women in a nude condition, and delivers the pictures to them, receiving pay therefor, may be convicted under a statute making it a crime to sell obscene, lewd, indecent, or lascivious photographs.

E. Doty, for the appellant.

M. Remley, attorney general, for the state.

700 **ROBINSON, J.** The admitted facts in regard to the transaction in question are as follows: The defendant carried on in Cedar Rapids a picture gallery called the “Riverside Studio.” While thus engaged, two women applied to him to take pictures of themselves, and he complied with their request, and made several tintype pictures of them. One of the pictures was taken of both women, and another of one of them, when nude. The pictures were completed by the defendant, and delivered to the women, who paid him twenty-five cents for each picture. It is clear, and not denied, that the pictures taken of the women when nude were obscene. The defendant was convicted under section 1 of chapter 177 of the acts of the twenty-first general assembly, which contains the following: “Whoever sells, or offers for sale or gives away . . . any obscene, lewd, indecent, or lascivious books, pamphlets, paper drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument or article of indecent or immoral use, . . . on conviction

thereof, shall be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both such ⁷⁰¹ fine and imprisonment at the discretion of the court." It is the theory of the appellant that he did not keep for sale, nor sell, nor give away, the pictures, within the meaning of the statute; that what he did was merely to make the pictures, the indecent portions of which were furnished by the women represented. The theory does not find support in the facts of the case, nor is it reasonable. The women desired and bargained for the obscene pictures, and that they contributed to the pictures by exposing themselves, when naked, before the camera, did not affect the character of the transaction. The products of that exposure and of the materials and skill used by the defendant were the obscene pictures. If it be true that the women had some rights in the pictures before they were delivered, as a right to prevent their use or delivery to other persons—a question we do not decide—the fact did not give the women any right to possess the pictures before the purchase price had been paid. Until that time the pictures belonged to the defendant, and his liability for the sale was not affected by the fact that his ownership may have been qualified by some rights possessed by the women. When he delivered the pictures to them, and received in return twenty-five cents for each picture, he sold them within the meaning of the statute, and the fact that he made them was an aggravation of, rather than a defense to, the crime of which he was convicted. No excuse for what he did is shown or attempted. When the women applied for the pictures, they told him they had a bet with a man, whom they named, to the effect that they dared to have pictures taken of themselves when nude. No question as to the development of art, or the dissemination of useful knowledge for lawful purposes, is involved in the case, and we have no occasion to determine whether the acts of the defendant would have been sanctioned by law under any circumstances. That ⁷⁰² his act in selling the obscene pictures he had made, under the facts admitted in this case, was a violation of law, is clear. The views we have expressed dispose of all the questions presented for our consideration. We do not find that the district court erred in refusing instructions to the jury asked by the defendant, nor in the charge given, and its judgment is affirmed.

INDECENCY—MAKING AND SELLING OBSCENE PICTURES.—The exhibition of an obscene picture is an offense tend-

ing to the corruption of morals, and is indictable at common law: Commonwealth v. Sharpless, 2 Serg. & R. 91; 7 Am. Dec. 632. A negative from which an obscene picture may be made is a picture, and sitting for such negative is procuring it: People v. Ketchum, 103 Mich. 443; 50 Am. St. Rep. 383; but an indictment for printing and publishing obscene pictures of naked girls is not sustained by proof of printing and publishing obscene pictures of girls naked only above the waist: Commonwealth v. Dejardin, 126 Mass. 46; 30 Am. Rep. 652. See, also, People v. Ketchum, 103 Mich. 443; 50 Am. St. Rep. 383.

CASES
IN THE
SUPREME COURT
OF
MAINE.

DUNNING v. MAINE CENTRAL RAILROAD Co.

[91 MAINE, 87.]

EVIDENCE, ADMISSION OF TO PROVE CONCEDED FACTS.—A litigant cannot prevent the introduction of relevant evidence against him by admitting, in general terms, the fact which such evidence tends to prove, if the presiding judge, in his discretion, thinks proper to receive it.

NEGLIGENCE—EVIDENCE OF OTHER FIRES COMMUNICATED BY THE DEFENDANT'S LOCOMOTIVE.—In an action to recover damages suffered by fire, which the plaintiff claims was set by a particular locomotive belonging to the defendant, evidence may be received tending to prove that, about the time of the fire in question and in the same vicinity, locomotives of the defendant caused fire by emitting sparks, cinders, or coal, and that fires were seen in the immediate vicinity of the track after the passage of the defendant's locomotives. The fact that the engine to which the injury is attributed is identified does not render such evidence inadmissible.

EVIDENCE OF A FIRE BURNING BESIDE A RAILROAD TRACK soon after a locomotive had passed is admissible to prove its capacity to set fires, though the witness does not know how the fire caught, nor how long it had been burning. The weight of the evidence is for the jury.

EVIDENCE CANNOT BE EXCLUDED from the jury because it is shown to be either inconsistent or inaccurate. It is for the jury to determine, in view of all the testimony, whether the witness was credible and reliable.

Charles P. Stetson and John R. Mason, for the plaintiff.

Charles F. Woodard, for the defendant.

55 SAVAGE, J. Action on the case to recover for the loss of property by fire alleged to have been communicated by a locomotive engine of the defendant corporation. The case comes up on a motion for a new trial, and on exceptions. The entire evidence and the charge of the presiding justice are made a part

of the bill of exceptions. The plaintiff's claim is based solely upon the statute (Rev. Stats. c. 51, sec. 64), which provides that "when a building or other property is injured by fire communicated by a locomotive ⁹⁶ engine, the corporation using it is responsible for such injury." No question of negligence on the part of the defendant is involved. The principal, if not the only, issue of fact submitted to the jury was whether the fire which occasioned the loss of the plaintiff's icehouse was, in fact, communicated by one of the defendant's locomotives. The plaintiff relies upon circumstantial evidence. The defendant claims that the circumstances proved are not sufficient to raise a legitimate inference that the fire was communicated by one of its engines.

The evidence introduced by the plaintiff shows, we think, that on May 27, 1896, the Dover and Dexter train, drawn by one of the defendant's engines, passed the plaintiff's icehouse at 4:35 o'clock P. M.; that about fifteen or twenty minutes later fire was discovered burning on the roof of the icehouse which inclined toward the railroad, at a point about fifty-five feet from the railroad track, and somewhat higher than the level of the track, but lower than the top of the smokestack of the engine; that when first discovered, the fire had burned over a space about two feet square; that when an attempt was made immediately afterward to beat it out with a stick, it was scattered to other parts of the roof; that there was no appearance of fire within the building until after the fire burned through the roof; that on that day no ice had been taken from the building, the icehouse engine had not been run, and no fire had been made or used within the building; that two or three workmen had been employed about the building during the day, one of whom was the watchman; that he finished work and left the building five or ten minutes before the passing of the Dover and Dexter train; that when he left, there was no appearance of fire in or about the building; that no person had been seen upon or about the roof that day; that the season was very dry, the roof was dry and the shingles old; that a strong wind was blowing toward the icehouse from the railroad; that in the vicinity of the icehouse, the railroad track, in the direction the Dover and Dexter train was going, had an upgrade of forty-one feet to the mile; that locomotive cinders were seen about the track at about the time of the fire, and that sparks were seen coming ⁹⁷ from a locomotive, but whether it was from the locomotive in question does not appear. There is no evidence that the fire was communicated by any of the de-

defendant's engines, unless it was by the one drawing the Dover and Dexter train.

Against the objection of the defendant, the plaintiff was permitted to introduce evidence to show that at various times about the time that this fire was caused and in that vicinity, engines of the defendant corporation, by emitting sparks, cinders or coals, spread fires, and that fires were seen on or in the immediate vicinity of the track, shortly after the passage of defendant's engines, of such a character as to show that they were caused by such engines; and the admissibility of testimony of this class is the principal question raised by the defendant's exceptions. Before the testimony was admitted, the defendant's counsel claimed that the plaintiff had already identified the engine as the one drawing the Dover and Dexter train, and gave notice that the engine drawing that train would be fully identified by the defendant, and the defendant did subsequently introduce evidence that the engine which drew that train was No. 95. Also before the testimony concerning other fires was admitted, the defendant's counsel expressly admitted the possibility of engines setting fires; and he now claims that because of this admission, the testimony, even if otherwise relevant and admissible, to show such a possibility should have been excluded. We do not think so.

It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances.

To return to the principal question. In the case of *Thatcher v. Maine Cent. R.R. Co.*, 85 Me. 502, a case similar to the one now under consideration, this court said, respecting evidence tending to ⁹⁸ show other fires communicated by the locomotives used on the defendant's railroad at different times about the same time that the plaintiff's lumber was destroyed by fire and in the same vicinity: "We think its competency, where the issue is whether the fire was communicated from a locomotive, is clearly established by courts of the highest authority. It tends to show the capacity of the inanimate thing to set fires along the road, and

when a fire is discovered soon after a locomotive has passed, and there is no evidence tending to show that it might have been caused in some other way, it authorizes the inference that it was caused by the locomotive." The learned counsel for the defendant claims that the rule, so stated, is subject to modification, and that it is applicable only when the engine alleged to have caused the loss is not identified. He claims, also, that the case of *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 502, itself recognizes such a modified rule. But that case merely recognizes that that "there are several authorities declaring that to be the rule," and further says, that as "neither the plaintiff nor any of his witnesses were able to identify the locomotive by name or number," the evidence, when admitted, was "clearly within the modified rule." So that even if the modified rule was the correct one, the defendant in that case had no good ground of complaint. This was not a recognition of the modified rule, as the law in this state.

The defendant's counsel further contends that as the admissibility of the evidence in the *Thatcher* case was finally sustained on the ground that at the time it was offered the particular engine had not been identified, so that, in any event, the case was brought within the modified rule claimed by the defendant, therefore the broader rule stated by the court—and which we have quoted—should be regarded as obiter dictum; and we are asked to reconsider the whole question.

It may well be doubted whether the evidence in this case on the part of the plaintiff, as to the identity of the engine, is sufficient to bring the case within the modified rule contended for. It is true that, during the trial, the defendant gave notice that it would fully identify the engine, but proof of identity from the defendant at that time would be of little service to the plaintiff to enable him ^{to} investigate the character, or the previous history, as to fires, of that particular engine, if he was to be limited by the modified rule; and neither the notice that proof would be made, nor the fact that it was made subsequently by the defendant, can affect the question we are discussing. The engine was not identified, on the part of the plaintiff, by name or number, but only as the engine which drew the Dover and Dexter train that day. There was no mark upon it, known to the plaintiff, by which he could identify it elsewhere. He identified the train. Was he bound to know that the same engine hauled the Dover and Dexter train each day? The defendant says this engine was No. 95. True. No. 95 is the same identical engine

day after day, but the engine drawing the Dover and Dexter train may be identical day after day, and it may not be. It would be manifestly difficult, if not impossible, for an injured party, who could identify an engine only by the train it drew on a particular occasion, to obtain any information which, within the modified rule, would be of any service to him, except such as the servants of the railroad company were willing to communicate. And the authorities seem to be to the same effect. *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 502, is in point. In *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, the trains were identified, but the court declared that the locomotives were not. So in *Diamond v. Northern Pac. Ry. Co.*, 6 Mont. 580; *Piggott v. Eastern Counties Ry. Co.*, 3 Man. G. & S. 228; *Koontz v. Oregon Ry. etc. Co.*, 20 Or. 3. In many cases where the modified rule has been applied, the engines have been identified on the part of the plaintiff by name or number: *Inman v. Elberton Air Line R. R. Co.*, 90 Ga. 663; 35 Am. St. Rep. 232; *Ireland v. Cincinnati etc. R. R. Co.*, 79 Mich. 163; *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. St. 341; *Erie Ry. Co. v. Decker*, 78 Pa. St. 293. In *Henderson v. Philadelphia etc. R. R. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, cited by defendant's counsel, four trains had passed within an hour, the engine of one of which was identified by the plaintiff by number, the others not. It was unknown which engine, if any, caused the fire. The court gave the modified rule as applicable in case of ¹⁰⁰ unidentified engine, and the broader rule, as stated by Libbey, J., in *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 502, as applicable in other cases, saying: "Where the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged."

But without regard to the question of identity, upon a careful re-examination of the decided cases, we are satisfied that the rule stated in *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 502, is supported by reason, and by the great weight of authority. We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives, at about the same time and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emis-

sion of sparks or the escape of coals. It is admissible as "tending to prove the possibility, and a consequent probability, that some locomotive caused the fire," language from *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 464, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof. A simple enumeration of some of the authorities which sustain these views may be useful: *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155; *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339; *Diamond v. Northern Pac. Ry. Co.*, 6 Mont. 580; *Piggott v. Eastern Counties Ry. Co.*, 3 Man. G. & S. 229; *Koontz* ¹⁰¹ *v. Oregon Ry. etc. Co.*, 20 Or. 3; *Chicago etc. Ry. Co. v. Gilbert*, 52 Fed. Rep. 711; *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340; 42 Am. St. Rep. 530; *Smith v. Old Colony etc. R. R. Co.*, 10 R. I. 22; *Annapolis etc. R. R. Co. v. Gantt*, 39 Md. 124; 1 *Thompson on Negligence*, 163.

The defendant has reserved exceptions to the admission of certain testimony as to other fires, which it claims does not fall even within the rule we have declared. In one instance, a witness testified to seeing fire in a pile of sleepers beside the railroad track soon after a locomotive had passed. This was admissible, and if, on cross-examination, the witness testified that he didn't know how the fire caught, or how long it had been burning, though "it couldn't have been a great while," this does not render his testimony any the less admissible. The weight of it was for the jury.

It is claimed, in regard to one witness who testified to seeing a fire soon after an engine passed, that his statements on cross-examination respecting the time he saw the fire were inconsistent with his first testimony; and in regard to another witness who testified to seeing certain fires two or three days after the day of the ice-house fire, that a witness for the defendant recollected these last fires as having occurred between two and three months later, and hence too remote in time to be fairly within the rule.

Whatever the facts may have been, these are questions which cannot be settled upon exceptions. The testimony in chief as given by the witnesses was admissible. It was for the jury to consider, in view of all the testimony, whether the witnesses were credible and reliable. The court cannot exclude the testimony of a witness because it is inconsistent or inaccurate.

In considering the motion for a new trial, we do not think it profitable to extend this opinion by an analysis of the evidence. Many of the salient points have been stated already. The defendant introduced much testimony respecting engine No. 95, and upon other matters, to show the improbability that the fire was caused by its engine. The evidence was wholly circumstantial. Giving to the circumstances their due weight, we cannot say that the jury ¹⁰² were not authorized to conclude that the fire was communicated by the defendant's locomotive.

Motion and exceptions overruled. Cause remanded for hearing in damages, as stipulated by the parties.

RAILROADS—NEGLIGENCE—LIABILITY FOR FIRES—EVIDENCE.—In an action to recover for the escape of fire from an unidentified locomotive, evidence that the company's locomotives generally, or many of them, at or about the time of the fire, threw sparks of unusual size and kindled numerous fires upon that part of the road, is admissible to strengthen the inference that the fire originated from the negligence of the company complained against: *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652. But when the locomotive alleged to have caused the fire is identified, evidence as to the condition of other locomotives and of their causing fires is clearly irrelevant and inadmissible: *Inman v. Elberton Air Line R. R. Co.*, 90 Ga. 663; 35 Am. St. Rep. 232, and note. See monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 73, 74. Such evidence has, however, been admitted where the locomotive was identified: *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155. Proof of other fires started at different points along defendant's line by sparks from engines is admissible as tending to prove the possibility and consequent probability that the fire in question originated in a similar manner: *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340; 42 Am. St. Rep. 530.

TRIAL—QUESTIONS FOR JURY—WEIGHT OF EVIDENCE AND CREDIBILITY OF WITNESSES.—It is the right of the jury and not of the court to determine the effect of evidence, unless in particular cases where its effect is declared by law: *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822, and note. And the credibility of testimony substantially uncontradicted is for the jury: *Dibble v. Northern Assur. Co.*, 70 Mich. 1; 14 Am. St. Rep. 470, and note. See *Turner v. Child*, 1 Dev. 25, 133, 351; 17 Am. Dec. 555; *Buffington v. Cook*, 35 Ala. 312; 73 Am. Dec. 491, and note.

LEWENBERG v. HAYES.

[91 MAINE, 104.]

SALE—ESTOPPEL TO DENY THAT TITLE PASSED BY.

One who sells goods with knowledge that they are to be put on sale is estopped, as against an innocent purchaser, from claiming that the sale was conditional and that the title had not passed.

J. F. Gould, for the plaintiff.

F. H. Appleton and H. R. Chaplin, for the defendant.

¹⁰⁶ HASKELL, J. Plaintiff sold one Dubay certain merchandise, half cash, half in thirty days, and delivered the goods without exacting the cash. The goods were shipped from Boston September 4th, and were received in usual time by Dubay and by him sold to defendant October 1st, and they were replevied during the month of October.

The delivery without exacting the cash payment was evidence that the same had been waived, and, if it had, the title passed to Dubay and his vendees. He had ordered goods August 27th, and September 16th, both before and after the bill in question, and they were shipped upon the same terms. From the whole transaction a jury might infer that plaintiff did not intend to insist upon the cash payment. He knew Dubay was a tradesman and would immediately put the purchased goods on sale. Perhaps a waiver may fairly be inferred, but waiver is a matter of fact when it is to be inferred from evidence, for the court says so in *Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 389. This case was tried by the sitting justice below, who ruled as a matter of law, there being no conflict of testimony, that defendant was entitled to judgment.

Now this ruling was incorrect, unless the defense can be sustained upon some other ground than waiver, and we think it can. The plaintiff is a merchant in Boston; his vendee a tradesman in Maine. The goods were sold with the knowledge that they were to be put on sale, and the plaintiff allowed the tradesman to expose the goods for sale as if he owned them, and the defendant, an innocent purchaser, bought them relying upon the apparent authority of the tradesman to sell them. Here the plaintiff, by his own inaction, allowed the defendant to assume that the tradesman ¹⁰⁷ had the title to them and might lawfully dispose of them. The defendant had a right to rely upon such apparent authority, and may invoke an estoppel against the plaintiff's claim that he had not waived the cash

price, and had not parted with title to the goods. The plaintiff allowed the defendant to be deceived, and he cannot now be permitted to take advantage of his own fault. Merely intrusting goods to another, without knowledge that they were to be put on sale, would not raise an estoppel: *Staples v. Bradbury*, 8 Me. 181; 23 Am. Dec. 494; but knowledge that they are to be put on sale and acquiescence in allowing them to be so exposed is equivalent to authority to sell them, and well may raise an equitable estoppel, that is matter of law, and a defense now favored both at law and in equity: *Caswell v. Fuller*, 77 Me. 105; *Milliken v. Dockray*, 80 Me. 82, and cases cited; *Tracy v. Roberts*, 88 Me. 310; 51 Am. St. Rep. 394.

Exceptions overruled.

ESTOPPEL TO ASSERT TITLE.—An owner, by exhibiting a third person to the world as having power to sell goods, loses the right to recover the goods from bona fide purchasers to whom they are sold by such person: *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541, and note. This because the owner is estopped to deny, as against them, the title or power which he allowed to appear to be vested in the party making the sale: *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and monographic note. See *Drew v. Kimball*, 43 N. H. 282; 80 Am. Dec. 163. But the vendor in a conditional sale, if he be guilty of no laches, may reclaim the property in the hands of a bona fide purchaser: *Crocker v. Gullifer*, 44 Me. 491; 67 Am. Dec. 118; monographic note to *Velsian v. Lewis*, 3 Am. St. Rep. 198, 199.

TAYLOR v. PORTSMOUTH, KITTERY AND YORK STREET RAILWAY.

[91 MAINE, 193.]

NUISANCE, PUBLIC.—A PRIVATE PERSON suing either in his own behalf, or on behalf of himself and others, cannot obtain an injunction against a public nuisance, unless he has suffered, or will suffer, some special damage not suffered by the general public.

PUBLIC HIGHWAYS, TO WHAT SERVITUDES SUBJECT.—The servitude which the public acquires by taking land for a public use is that of a public use, for the convenience of the public, to be molded or applied as public interests or convenience may demand, and as the methods of mankind may, from time to time, require. Hence a way may be employed for new methods of transit.

PUBLIC HIGHWAYS — ADDITIONAL SERVITUDE, WHAT IS NOT.—A STREET RAILWAY, by whatsoever power propelled, is not an additional servitude for which an abutting property owner is entitled to additional compensation.

CORPORATIONS, ATTACK UPON POWER AND AUTHORITY OF.—In a suit to enjoin an alleged street railway cor-

poration from using a public highway, an abutting property owner cannot obtain relief on the ground that the charter of the defendant is void for constitutional reasons. The state only can inquire into the validity of the charter if the defendant is a de facto corporation.

G. M. Seiders, F. V. Chase, Frank D. Marshall, and James T. Davidson, for the plaintiffs.

H. M. Heath and C. L. Andrews, for the defendant.

¹⁹⁵ HASKELL, J. Bill in equity by the abutting owners of land on a public way to enjoin a railway company from use of the way because such use creates a public nuisance.

Nothing is better settled in this state than that equity will not enjoin a public nuisance on the application of an individual, either in his own behalf or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained: *Pomeroy's Equity Jurisprudence*, sec. 1349, and cases cited. Equity supplements the law, and there is no need of remedy, where there are no damages at law: *Staples v. Dickson*, 88 Me. 362; *Holmes v. Corthell*, 80 Me. 31.

The bill also seeks an injunction because the plaintiffs are not only abutters, but owners of the fee of the way subjected to the servitude incident to public ways, and that the defendant's use is an additional servitude for which they are entitled to compensation that must first be paid before the servitude may be enjoyed; and this is the main controversy in the cause; for, if the defendant's use of the way be no additional servitude, then the plaintiffs' right in the way and its use are merged with those of the public, and the public alone by its laws must define, control, and regulate such use.

What servitude, then, does the public acquire by the taking of land for a public way? It is the right of transit for travelers on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas, and sewage for the use of the public. It is a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand and as the methods of life and communication may from time to time require. ¹⁹⁶ Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for

travel. When the way is constructed the landowner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop.

When the way has been created, the public controls its use, and regulates its repair by laws that the legislature shall enact. Under these laws the use must be governed, for the people have a right to say what use will best subserve their interests. They have now said that ways shall be maintained "so as to be safe and convenient for travelers with horses, teams, and carriages." That is now the criterion, and a use that infringes upon that rule becomes an unlawful use, and may be prohibited by public prosecution. That rule may be changed, for the public, by law, may regulate the use of its public ways in such manner as the legislature may think will best serve the public interest.

This doctrine allows the public to control the use of public ways for travel and communication, as it may be pleased, from time to time, to do. The kind of use that may be permitted is of no consequence to the abutter. He must take this chance with the rest of the community in which he lives. Some cases may seem to work hardship, but it is better so than to embarrass the convenience of the people, and cripple and annoy enterprises which the present and future may recognize as necessary for the good and happiness of society.

No matter whether the way be used by the lone traveler on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by the dray, cart, or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity, or any other agency that may be discovered suitable for the purpose. No matter whether the vehicle carries passengers or freight, or ¹⁹⁷ passes intelligence along its contrivance. All these are public uses, and, so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor. Ways must be "safe and convenient." When they are not, by reason of any encumbrance or permitted use, then ample remedy may be had by public action, and such encumbrance or use may be removed or prohibited.

The servitude complained of in this cause, therefore, is a pub-

lic servitude and lawful, so long as it does not infringe the laws of the state regulating the use of ways. It gains no hold upon the soil of itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be extinguished also. It must exist or fall with the servitude of the public, otherwise the doctrines of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then, manifestly, it has created an additional servitude, and taken land without compensation to the owner.

These doctrines have been discussed in the numerous courts of this country with varied results. It will not be profitable to review them, for we think best to declare a doctrine best suited to the convenience of our people and most consonant with the laws under which we live. We have persistently maintained the right of "free fishing and fowling," free and unobstructed navigation of our rivers, the free taking of ice upon them, the right of eminent domain over and in the waters of great ponds, and we now assert the right of the people to control the use of their public ways as shall best meet their necessities, without vexation from the landowner, whenever growth and discovery show the convenience of applying new methods for public transit. Let a public way once constructed be free for the public use and control as it may choose. Let it be free as the ocean is free, as our rivers are free, and as our great ponds and lakes are free for the use of all the people.

If the reverse of this doctrine be held, the numerous street railways now operating in our state would be crippled, if not destroyed. If every abutter could enjoin their operation unless his damages were paid, there would be no end of litigation and confusion. ¹⁹⁸ Moreover, it is now too late to invoke such doctrine. We have already decided that a street railway, propelled by electricity, creates no additional servitude: *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 363; 1 Am. St. Rep. 316. Relying upon that doctrine, electricity has become the principal motor for all our street railroads, and it would be unjust to now overturn it, if we were inclined so to do. On the contrary, we deem it best and most consistent with our laws and polity to affirm it, and further that neither motor, nor kind of traffic to be engaged in make any difference, so long as the use does not violate the requirements of the statute, concerning which we are not called upon to decide at the instance of an individual.

Now it may be said that the location of a street railway, by authority of the legislature, should give it a vested right to re-

main after the discontinuance of the way. But it must be remembered the legislature only gave a right to share the public easement, and, when that shall be extinguished, all the granted right will be extinguished. It may be that the act of the legislature granting a share in the easement gives a vested right therein, that can only be extinguished by the consent of the grantee, or by authority of the legislature granting it. Of this we have no occasion to decide.

The doctrine of this opinion must not be extended too far. Perhaps the fair inference will be that the taking of land for a way only contemplated surface transit. We do not decide otherwise. When elevated systems of transit are introduced, the permanence of their structure and the annoyance and injury may, perhaps, seem fairly to contemplate a further servitude. Of this, too, we have no occasion to decide.

It must be remembered that the use of ways for street-car transit can be enjoyed only by the act of the people themselves. Their ballots control, and, if they share their use with others who aid in serving the use common to both, it is a public use after all. The public grant the privilege and control its enjoyment. The exercise of such power best serves our people, who are intelligent enough to understand their necessities and comforts.

199 But the plaintiffs say that the charter of defendant company is void for constitutional reasons. This contention is not open in this cause. The defendant is acting under a charter from the legislature. It is a *de facto* corporation at least. The state only can inquire into the validity of the charter. But if the contention were open to the plaintiffs, it could do them no good. They have impleaded the defendant as a corporation, and joined no other persons. If it has no corporate existence, who shall be enjoined? The only prayer in the bill is, that defendant corporation be enjoined. If there be no corporation, how can it be enjoined? Suppose plaintiffs had sued a dead man, could they have relief?

It is also contended that the proper approval of the location of the road has not been obtained from the municipal officers of the town. We think the evidence shows the reverse. There is no occasion to review it.

How, then, does the cause stand? The plaintiffs as abutters and owners of the fee of the way, have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the

way, so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and, therefore, have suffered no special damage, and can have neither an action at law or relief in equity.

Bill dismissed with costs.

NUISANCE—SPECIAL DAMAGE ENTITLING PRIVATE PERSON TO SUE.—A private action for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623; 52 Am. St. Rep. 860. A damage, to be special, within the meaning of the rule, must result directly from the nuisance, and not merely as a secondary consequence thereof, and must differ in kind, and not merely in extent or degree, from that which the general public sustains: *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 46 S. C. 327; 57 Am. St. Rep. 688, and note.

HIGHWAYS—ADDITIONAL SERVITUDES—STREET RAILWAYS.—While the fundamental idea of a highway is that it is for public travel, yet the purposes for which it was acquired are not limited to travel and passage in the then known vehicles and methods, for all new vehicles and methods of travel thereon which are not inconsistent with the safe and practical use of the highway for travel in the ordinary methods are included within the public easement: *Note to Cater v. Northwestern Teleph. etc. Co.*, 51 Am. St. Rep. 549. The authorized use of a public street for street railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note; *Doane v. Lake Street etc. Ry. Co.*, 165 Ill. 510; 56 Am. St. Rep. 265, and note.

CORPORATIONS DE FACTO—ATTACK UPON POWER AND AUTHORITY OF.—Against a de facto corporation, as a general rule, a collateral attack by a third person will not avail. The reason is, that if rights and franchises have been usurped they are the rights and franchises of the sovereign, and he alone can interpose: See monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 182.

GOULD v. BOSTON EXCELSIOR COMPANY.

[91 MAINE, 214.]

PAROL EVIDENCE OF OTHER AND ORAL STIPULATIONS MAY BE RECEIVED, when some of the stipulations of a contract are in writing, where the writing or writings, by reason of their brevity, informality, and skeleton nature, do not of themselves imply that all the stipulations of the parties with reference to the subject matter were intended to be expressed in them, and when the particular stipulation is of such a nature that the omission to express it in the writing does not indicate that it was not agreed upon, and it in no way conflicts with the written stipulation, and does not increase the burden of either party.

PAROL EVIDENCE RESPECTING WRITTEN CONTRACT FOR CUTTING, DRIVING, PEELING, AND DELIVERING LOGS.—Where a contract for the cutting, peeling, and deliv-

ering of logs is silent as to how and by whom they shall be scaled, parol evidence is admissible to prove what were the terms of the agreement between the parties upon this subject.

Assumpsit to recover seventy-five cents per cord for delivering three thousand two hundred and thirty-five cords of poplar. The defendant claimed that the amount of the wood was six hundred and forty cords less than claimed by the plaintiffs. They offered, and the court received, evidence tending to prove that, prior to entering into the written contracts, the parties agreed that the wood should be scaled by a scaler to be selected by the plaintiffs, and that he was selected by them and was competent, and that by his scaling the amount of the wood was as alleged in their complaint. The admission of this evidence was objected to by the defendant. The memoranda of their contracts, signed by the parties, were as follows:

"BOSTON EXCELSIOR COMPANY.

"Manufacturers and Dealers in Excelsior and Upholsterers' Supplies.

"Julian D'Este, Treas.

26 Canal Street.

"Boston, Mass.

"Sebec, Me., Mar. 29, '94.

"We, the undersigned, do hereby agree to take the poplar cut and peeled for the Boston Excelsior by Hoxie Bros. now on landing at Ship Pond Stream and drive and deliver the same in their boom at their dam in Milo Village, Me., in the spring of 1894, for 75 cts. per cord.

"We do further agree to deliver all poplar delivered in booms to the Boston Excelsior Co. from other parties on Sebec Lake to the Boston Excelsior Co. at their boom in Milo Village, Me., in the spring of 1894, for 25 cts. per cord.

"We further agree to deliver and yard on the landing at Ship Pond Stream (what poplar was left in the woods peeled by Hoxie Bros.) during the summer of 1894, for \$1.00 per cord.

"We also agree to cut and peel 2,000 (two thousand) cords of poplar, if there be that amount, on land known as the Quarry Tract owned by S. & J. Adams of Bangor, Me., and drive and deliver the same to the dam of the Boston Excelsior Co. in Milo Village, Maine, in the spring of 1895—cutting, peeling, and delivering the same at landing on Ship Pond Stream, for \$1.50 per cord, and 75 cents per cord for driving the same to the dam of the Boston Excelsior in Milo Village, Maine.

"A. H. GOULD.

"J. C. DEAN.

"BOSTON EXCELSIOR COMPANY.

"Manufacturers and Dealers in Excelsior and Upholsterers'
"Supplies.

"Julian D'Este, Treas.

20 Canal Street.

"Boston, Mass., Mar. 29, '94.

"We, the undersigned, agree to pay Gould & Dean the sum of \$500.00 (five hundred dollars) when the poplar now landed in Ship Pond Stream is driven out into Sebec Lake (to pay men with) and pay them the balance when the rest of the poplar in is in the Milo boom. We further agree to advance money to pay men for peeling and yarding poplar on Ship Pond Stream, to be cut as agreed upon land known as the Slate Quarry Tract owned by S. & J. Adams. Also to advance money to pay men for yarding upon Ship Pond Stream such poplar as was left in the woods by Hoxie Bros. in their operation, when same is yarded on stream.

BOSTON EXCELSIOR CO.,

"By JULIAN D'ESTE, Treas."

W. E. Parsons and J. B. Peaks, for the plaintiffs.

H. Hudson and F. E. Guernsey, for the defendant.

²¹⁹ EMERY, J. The defendant had purchased some poplar cut upon the land of Adams, and desired to have it driven down the streams to its mill. It also desired to have other poplar on Adams' land cut, peeled, and driven. To this end, its agent had some conversations with the plaintiffs with reference to their doing the cutting, peeling, and driving. As a result of these conversations the plaintiffs gave the defendant a written memorandum signed by them only, and the defendant at the same time gave them a written memorandum signed by its agent only. These memorandums are printed in full, ante, p. 222, and above.

The plaintiffs did cut, peel, and drive more or less poplar for the defendant under these memorandums, and the amount, or number of cords, was the only question before the jury.

It will be noticed that in neither memorandum was it stated by whom the poplar should be scaled, or that it should be scaled at all. The plaintiffs offered to show by parol evidence that, during the conversations prior to the exchange of the memorandums, it was orally agreed by both parties that the poplar should be scaled by a scaler to be sent by Adams, the landowner, and that his ²²⁰ scale should control. Was such parol evidence admissible for that purpose under these circumstances?

It is difficult to reconcile the various decisions upon the general question of when parol evidence of other and oral stipula-

tions may be received where some stipulations are expressed in writing. The cases cited in the majority and minority opinions of the court in *Neal v. Flint*, 88 Me. 72, are evidence of that difficulty.

We think, however, that a safe rule, decisive of this case, may be readily deduced from the great majority of the decisions, viz.: Where the writing or writings, by reason of their brevity, informality, or skeleton nature, do not of themselves import that all the stipulations between the parties with reference to the subject matter were intended to be expressed in them—and where the particular stipulation is of such nature that the omission to express it in the writing does not indicate that it was not agreed upon—and it in no way conflicts with any written stipulation—and does not increase the burdens of either party—parol evidence of such stipulation is admissible. We do not say that all the above conditions must exist before the parol evidence can be received. We only say that where they do exist, the parol evidence is admissible. The justices of this court have been unanimous in support of at least this latter proposition: *Bonney v. Morrill*, 57 Me. 368; *Neal v. Flint*, 88 Me. 72.

In this case there was no formal draft of a contract containing reciprocal stipulations signed by both parties. There were only informal memorandums exchanged relating to time, place, and price, and making certain the things usually most in debate and most desirable to have made certain. The poplar under such memorandums would require to be scaled. It would be natural to provide for a scaler. The omission to name him in the memorandum does not indicate that the parties agreed to do without a scaler. The alleged oral agreement that Adams, the landowner, should send the scaler does not add to, subtract from, nor in any way vary the duties of either party. It was equally for the benefit of both parties. It was competent for either party to prove the stipulation by parol evidence notwithstanding the writings.

Exceptions overruled.

CONTRACTS—PAROL EVIDENCE TO EXPLAIN OR MODIFY.—It is well understood that parol evidence is admissible to explain a writing, to make its terms definite, to fill out an incomplete contract, to show the circumstances under which it was made, and to prove a collateral, contemporaneous, or subsequent agreement not inconsistent with the written agreement: See monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 660, 661; *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436, and note.

COHEN v. MANUEL.

[91 MAINE, 274.]

THE FACT THAT THE PLAINTIFF WAS PEDDLING WITHOUT TAKING OUT A LICENSE, as required by law, will not prevent his recovering of an innkeeper for goods stolen while he was the latter's guest. It is not unlawful for a peddler, though without a license, to eat, drink, and be sheltered in an inn, and hence his being without such license does not relieve the innkeeper from any of his obligations or liabilities to him.

INNKEEPER'S LIABILITY FOR GOODS WHILE IN A STABLE.—If a peddler stops at an inn, and is directed by the innkeeper to take his horse and cart to a stable belonging to the innkeeper, but kept as a livery stable, and the horse and cart are thereupon taken to the stable and delivered into the custody of the hostler, they are thereby delivered to the innkeeper as such, and he is answerable for goods stolen from the cart.

P. G. White, for the plaintiff.

J. B. Peaks and E. C. Smith, for the defendant.

275 SAVAGE, J. This is an action on the case, wherein the plaintiff claims to recover of the defendant, an alleged innkeeper, for the loss of his goods while he was a guest at the defendant's inn. The plaintiff was a peddler and stopped at the defendant's inn, and while his peddle-cart was in the defendant's stable, it was broken open and the goods in question were stolen therefrom. By their verdict for the plaintiff, the jury, under instructions to which no exceptions were taken, have settled that the defendant was an innkeeper, that the plaintiff was a traveler, and a guest at the defendant's inn, and that the goods were lost while the plaintiff was defendant's guest.

The defendant contends that the plaintiff, being a peddler, and **276** the goods lost having been merchandise carried by him for the purpose of sale, is not entitled to recover unless he shows affirmatively that he was licensed as a peddler under the provisions of the Public Laws of 1889, chapter 298; the defendant also contends that under the circumstances of the case, he is liable, if at all, only as bailee, and not as innkeeper.

1. The defendant's bill of exceptions states that "there was evidence tending to show that, at the time of the loss, the plaintiff was traveling from town to town, and from place to place in the town of Brownville, selling said goods and chattels, in violation of section 1, chapter 298, of the Public Laws of 1889, unless the plaintiff had a license from the secretary of state so to do. There was no evidence from either plaintiff or defendant as to whether the defendant had a license or not."

The defendant requested the presiding justice to instruct the jury that "an innkeeper is not liable for the loss of merchandise carried by a peddler for the purpose of sale, who stops at said inn, unless such peddler has a license to peddle under the laws of the state." This instruction was refused.

There was no evidence in the case that the plaintiff did have or did not have a license, and the defendant claims that the burden to show a license was on the plaintiff. But we do not consider or decide this question, because if, as we hold, the want of a license does not preclude the plaintiff from recovering, the matter of the burden of proof is immaterial.

We think that the plaintiff is not debarred from maintaining this action, though he may have had no license as a peddler.

The defendant relies upon the principles stated in *Lord v. Chadbourne*, 42 Me. 429; 66 Am. Dec. 290; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419, and other cases. It is true, in the language of *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, that "the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment." It is true, in the language of *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419, that "there are cases wherein an injured party will be remediless, because of his own fault, even when the ²⁷⁷ fault does not contribute to the accident. A vessel engaged in the slave trade, piracy, or smuggling and injured by another, or the keeper of a gambling-house injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for these offenses, nor because their illegal business brought them to the place of danger; but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades, prohibited things receive no protection." Among such prohibited contracts is the sale of intoxicating liquor intended for illegal sale in this state: *Wasserboehr v. Boulier*, 84 Me. 165; 30 Am. St. Rep. 344; the sale of hay pressed and baled and not branded: *Buxton v. Hamblen*, 32 Me. 448; the sale of lumber not surveyed and marked: *Richmond v. Foss*, 77 Me. 590; the sale of hoops not culled: *Durgin v. Dyer*, 68 Me. 143.

All such sales are expressly, or by implication, forbidden by law. So a party has been held remediless who seeks to enforce a contract made on Sunday: *Towle v. Larrabee*, 26 Me. 464. And he who suffers an injury arising from his violation of the Sunday law, so-called, is equally without remedy: *Wheelden v. Lyford*, 84 Me. 114.

The language in *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, and in *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419, is a correct statement of a general proposition. How inapplicable it is to the case at bar can easily be seen when we look at the questions which were decided in these cases. In the former, the precise question decided was that under the provisions of the statute of 1851, chapter 211, section 16, no action whatever could be maintained for intoxicating liquors or their value. Intoxicating liquors were thus practically outlawed. Trespass against a wrongdoer even could not be maintained. But when the statute was modified, the rule was modified accordingly, and it was thereafter held that trespass would lie for the unauthorized conversion of intoxicating liquors, even though they were intended for illegal sale in this state: *Hamilton v. Goding*, 55 Me. 419; *Bliss v. Winslow*, 80 Me. 274; 6 Am. St. Rep. 195; *Adams v. McGlinchy*, 66 Me. 474. In *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419, the question actually decided was that a party who ²⁷⁸ erects an obstruction in a navigable stream, and thereby occasions an injury to another, cannot, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in worldly employment on Sunday, when the injury occurred.

It will be seen in the illustrations which we have given that a remedy has been refused, because the plaintiff's right of action was directly connected with, or grew out of, a violation of law. But it is not unlawful for a peddler, with or without license, to put up at an inn. The plaintiff did not lodge at the defendant's inn as a peddler, but as an individual. As a property owner merely he intrusted his property to the defendant's safe-keeping. It was not unlawful for him to eat, drink, and be sheltered in an inn, nor to deliver, or offer to deliver, his money and other property to the innkeeper for safe custody. If his property consisted of merchandise carried by him for the purpose of sale, without a license, in violation of law, it was none the less property. A peddler may lawfully care for and protect his property. If he exposes it for sale, or sells it, without license, he may be fined. No penalty attaches to the merchandise itself. It cannot be seized or forfeited. It is neither contraband nor outlawed. The rights and liabilities which exist between the innkeeper and his guest, who is a peddler, are created by law, and grow out of the relation between them, and are in no degree dependent upon the purpose of the owner to sell the goods at some future time without license. It is, therefore, the opin-

ion of the court that even if the plaintiff had no license to peddle, that fact would not constitute a defense to this action, and that the requested instruction was properly refused.

2. The evidence tended to show that the defendant's stable, where the plaintiff's peddle-cart was kept, was a livery stable, unconnected with the inn, and known by the plaintiff to be so. The defendant directed the plaintiff to take his horse and cart to the stable. The plaintiff did so, and there put them into the care of the defendant's hostler. The defendant requested that the jury be instructed that "an innholder is not liable for the loss of merchandise, carried by a peddler, who stops with said innholder, which ²⁷⁹ is left by such peddler in a livery stable known by said peddler to be a livery stable, and not connected with said inn." This request was refused, and we think correctly refused.

The defendant does not claim that an innkeeper may not be liable for the loss of the merchandise of his guest, under some circumstances, but he insists that when the plaintiff left his cart in the livery stable "not connected" with the inn, the defendant's liability, at the most, was that of bailee, and not that of innkeeper. As the stable belonged to the defendant, and was used by him for putting up the team of his guest, we understand the expression "not connected," as applied to the stable, to mean that the stable was not physically attached to the inn, that it stood in a different place.

By the statute law of this state (Rev. Stats., c. 27, sec. 7) an innkeeper is not liable for goods such as it is claimed were lost in this case, except upon delivery, or offer of delivery, by the guest to the innholder, his agent, or servants, for safe custody. The plaintiff put up at the defendant's inn. He thereby became a guest. He had a horse and peddle-cart. He was directed by the defendant to take them to the stable. He did so. He put them into the care of the defendant's hostler. This constituted a statutory delivery to the defendant. It is clear that the delivery was "for safe custody," and in this respect, this case is unlike the cases cited by the defendant, where a peddler took his merchandise to a separate room to show and sell: *Neal v. Wilcox*, 4 Jones, 146; 67 Am. Dec. 266; or where one procured from the landlord a lot in which to keep his hogs and horses for the purpose of showing and selling them: *Burgess v. Clements*, 4 Maule & S. 306; or where one had a room especially for the purpose of keeping or selling his goods: *Carter v. Hobbs*, 12 Mich. 52; 83 Am. Dec. 762.

When the plaintiff's goods were thus delivered to the defendant for safe custody, they were *infra hospitium*. Though the defendant directed them to be placed in a stable "not connected" with his inn, his liability was not modified or discharged. It was his stable. It was the place he selected in which to keep the goods safely. That the place was not connected with the inn does not ²⁸⁰ control: *Hilton v. Adams*, 71 Me. 19. It was a single transaction—the putting up at the inn, and the delivery of the goods to the defendant. We cannot doubt but that the defendant received the plaintiff's goods as an innkeeper: *Norcross v. Norcross*, 53 Me. 163, and cases cited; *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 449, and note to same case. The refusal of the presiding justice to give the requested instruction was right.

The defendant waives his other exceptions.

Exceptions overruled.

INNKEEPERS—RIGHTS OF GUESTS AS TO GOODS STOLEN.—Anyone away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such: *Pullman etc. Co. v. Lowe*, 28 Neb. 239; 26 Am. St. Rep. 325. An innkeeper is *prima facie* liable for any loss or injury to the goods of his guest not caused by an act of providence, the public enemy, or the fault of his guest: *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240, and note. An innkeeper, who is also a livery stable keeper, and who receives a horse to be fed, will be liable as an innkeeper, unless he gives notice that he takes the horse as a keeper of a livery stable: *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471; and he is liable for grain belonging to a guest which was stored in an outhouse appurtenant to the inn, and was stolen therefrom: *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 448, and monographic note. See *Newson v. Axon*, 1 McCord, 509; 10 Am. Dec. 685.

WHITMORE v. ORONO PULP AND PAPER COMPANY.

[91 MAINE, 297.]

A LANDLORD DOES NOT OWE TO A LESSEE, nor to the servants or employes of the lessee, the duty of making an examination of the leased premises before turning them over to the lessee, for the purpose of determining whether appliances used therein are in such a condition that no injury shall result therefrom to the lessee or his employes from their being out of repair or weakened by the use already made of them, where the lessee, by reasonable effort, could have discovered and guarded against danger as well as the lessor.

LANDLORD AND TENANT—DUTY OF THE FORMER TO DISCOVER AND WARN THE LATTER OF LATENT DEFECTS. An owner of property, unaffected by a public use, does not owe to

his prospective lessee the duty of actively exerting ordinary care, at the time of the leasing, to discover and apprise him of unknown defects which the lessee could equally well find out for himself.

THE RULE OF CAVEAT EMPTOR IS AS APPLICABLE TO A LEASE as to a sale of real property. Hence, neither the lessee nor his servants can recover of the lessor for injuries resulting from an appliance, constituting part of the leased premises, being out of repair or so weakened by its previous use that its further use must expose the lessee or his servants to the peril of personal injury.

NUISANCE AS BETWEEN LESSOR AND LESSEE.—To constitute a thing a nuisance as between a lessor and a lessee and the servants of the latter, it must itself work some unlawful peril to the health or safety of persons or property. It is not sufficient to constitute it a nuisance that, upon being employed for some purpose for which it was intended, it proved to be inadequate, and, through its weakness, caused injury to the lessee or his servants.

P. H. Gillin and C. J. Hutchings, for the plaintiff.

C. P. Stetson and C. J. Dunn, for the defendant.

³⁰² EMERY, J. The defendant company, the Orono Pulp and Paper Company, constructed and for a few years up to October 1, 1892, operated a pulpmill in Orono. On that day it leased its mill and plant to another and distinct corporation, the Bangor Pulp and Paper Company, for twenty-five years. This latter company, the lessee, took possession of the leased property on the same day and for some little time thereafter operated it as a pulpmill on its own account. By the terms of the lease the Bangor Company, the lessee, was to have the exclusive possession of the property and was to keep it in substantial repair, the lessor reserving the usual right to enter upon and view the premises at times convenient to the lessee. The lessor made no stipulation as to the condition of the property.

The plaintiff's intestate, Austin J. Whitmore, had entered into the employ of the lessee, the Bangor company, and was in its employ, upon the premises thus leased and operated by it, on the eleventh day of October, 1892. On that day one of the digesters, a large cylinder of deoxydized bronze and an essential part of the machinery of the mill, exploded while Mr. Whitmore was at work near it in the line of his duty. He was so severely injured by the explosion that he died a few weeks afterward. The explosion resulted from the inability of the digester to resist the usual pressure of steam injected into it in the course of the business of the mill.

For this injury the plaintiff, as administratrix, first brought an ³⁰³ action against the Bangor company, the lessee operating the mill and plant, and her husband's employer, counting

upon the negligence of that company, and recovered judgment upon the ground that that company had not exercised due care in examining into and ascertaining the real condition of the digester, which in fact was too weak to withstand steam pressure used. By reason of the insolvency of that company the plaintiff has not been able to collect any part of that judgment.

The plaintiff thereupon brought this action against the lessor of the mill and plant, the Orono Pulp and Paper Company, counting upon its neglect of its duty in the matter of the faulty digester. The defendant company did not construct the digester, but purchased it from a reputable manufacturer of digesters. In selecting, purchasing, and setting up this digester, it is not questioned that the defendant company exercised due care. At the first it was sufficiently strong. It was weakened after a time by the peculiar and continued action of the necessary chemicals upon the particular metal of which it was composed. This action was wholly confined to the interior of the closed cylinder, and was invisible from the outside.

Granting, that at the time of the execution of the lease and the change of the possession and control of the premises from the lessor to the lessee, the digester was then in fact too weak for its purpose, it does not appear from the evidence that any officer or agent of the lessor company was actually aware of that condition of the digester, or that knowledge of it could have been obtained, except by actual examination of the interior or by inference from sufficient technical learning as to the peculiar action of the particular chemicals upon the particular metal. The outward visible indications all were that the digester was as strong as ever.

The defendant company did not make the necessary examination, before or at the time of leasing, and did not possess the requisite technical learning to make the correct inference without examination; but there is no suggestion of fraud or concealment in the matter. It may be that this omission and ignorance were a breach of a duty owed by the defendant company to its own employes or ³⁰⁴ servants, but that proposition alone will not sustain the plaintiff's action. A person may owe a duty to one individual, or class, which he does not owe to another. The duty may depend wholly upon the relation between the parties. The plaintiff must, therefore, maintain the proposition that the defendant owed to the servants of

its lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results before turning the plant over to the lessee. Whether the law of this state supports that proposition is the question presented.

It should be noted, at the outset, that the defendant company is not a public corporation, engaged in a public business, enjoying public franchises and owing special duties in consequence thereof. It is a private corporation, transacting a purely private business, and dealing in this instance with another private party. Hence, the rules and principles applied to owners of railroads, wharves, elevators, public halls, etc., do not necessarily govern this case. Again, the plaintiff's intestate was not upon his own premises, nor upon any public road or place at the time of the explosion, but was voluntarily upon the leased premises under a contract with the lessee only. Hence, the doctrines of the law of liability for nuisances to strangers or the public are not necessarily applicable. It should be further noted that the lessee engaged to make repairs—that the lessee had as much ability and opportunity as the lessor to ascertain and guard against the actual condition of the digester before accepting and using it, and subjecting the plaintiff's intestate to the consequent danger. Indeed, the plaintiff recovered her judgment against the lessee for this same injury upon that very ground, that the lessee by reasonable effort could have done, and yet did not.

It is not questioned that under such circumstances the lessor owes no more or other duty to the lessee's servants or assigns, than he does to the lessee himself. If his duty or freedom from duty to the lessee is made plain, his duty or freedom from duty to the lessee's servant is equally plain. The discussion, therefore, may be confined to the duty of the lessor to the lessee.

305 Under such circumstances as have been disclosed and stated in this case, does the owner of property, unaffected by any public use, owe to his prospective lessee the duty to actively exert ordinary care at the time of the lease to find out and apprise him of unknown defects which the lessee can equally well find out for himself?

The development of the law has not yet progressed so far in this state. Here the common-law rule of caveat emptor is still in force, and is applied to the lease as well as to the sale of property. It was early said in *Hill v. Woodman*, 14

Me. 38 (42, 43), that, in the absence of express stipulations as to the condition of the premises, the lessee took them for better or worse, at least when he had sufficient means for ascertaining their condition. In *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229, it was explicitly declared to be the law that there is no implied obligation upon the lessor, to see that a leased building is safe, well built, or fit for any particular use, that a leased house is reasonably fit for habitation, or that leased land is fit for the purpose for which it is taken. In *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, the owner was held bound to effectually repair where he assumed and began to repair, but it was declared he was under no obligation to repair, and that "the tenant, on the principle of caveat emptor and in the absence of any fraud upon the part of the landlord, takes them [the leased premises] in the actual condition in which he finds them for better and for worse." In *McKenzie v. Cheetham*, 83 Me. 543, the defendant had leased the second story of a dwelling-house with a defective landing for a stairway which was the only means of ingress and egress for the second story. The plaintiff had made a social call upon the tenant, and on leaving fell through the defective landing. The court held that the defendant owed no duty to the tenant or to his caller, the plaintiff, as to the defective landing upon the premises, even though the landing was essential to the reasonable use of the leased tenement. It was again iterated (pages 548, 549) that "the law, in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim caveat emptor, and he takes the premises as he finds ³⁰⁶ them, for better or worse"; and many authorities were cited. The court also necessarily decided that the lessor owed to no one on the premises under the lessee any more duty than he owed to the lessee himself.

So stands the law in this state to-day, well known and hitherto acted upon. Any desired change or extension of it should be asked of the legislature and not of the court.

The case of *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, rightly understood, is no departure from the former decisions of this court. The defendant railroad company, the owner of the railroad, had not leased it to the Portland and Ogdensburg Railroad Company, the plaintiff's employer, nor had it in any way turned over the whole plant to the latter company. It had simply permitted the Portland

and Ogdensburg Company to run through freight trains over a part of its tracks. It retained the possession and control of its tracks, station-houses, platforms, etc. The plaintiff, a brakeman in the employ of the Portland and Ogdensburg Company, was injured in the line of his duty, through the defective construction of a station awning on the defendant's road. It was conceded that, upon the above facts, the defendant company, having control of the station-house, awning, platform, etc., and inviting the plaintiff to pass and re-pass in the line of his duty as such brakeman, owed him the duty of so constructing and maintaining the awning as not to be dangerous to him. But after this arrangement with the plaintiff's employer, and while it was in force, and before the injury, the defendant company leased its entire road, including stations, to the Boston and Lowell Railroad Company which latter company completely took over and operated the entire road, agreeing to assume all liability for injuries, etc.

The plaintiff was injured while the lessee was in possession under that lease. It was contended by the defendant company that such lease and transfer of possession freed it from what otherwise would have been its duty and liability to the plaintiff. The court held that they did not. That was the point of the decision.

The decision in *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, is really based upon the proposition that the owner of a railroad, or other property affected ³⁰⁷ by a public use, with which the public have business relations, owes a duty to all persons who lawfully come upon the property to make and keep the property safe for all such persons, and cannot avoid that duty by merely leasing the property and retaining rents. That proposition, as before stated, does not include this case of property of a purely private nature, with which the public has no business relations.

It is true, as urged by the plaintiff, that the learned justice writing the opinion in the *Nugent* case also adduced as an additional support for the judgment the responsibility of a lessor in some cases for the condition of the demised premises, but this was not necessary for the decision and was not intended to be applied to a case like this. The same justice afterward wrote the opinion in *McKenzie v. Cheetham*, 83 Me. 543, reaffirming the doctrine of the earlier cases.

The plaintiff, however, advances another and distinct proposition,—that the weak digester was a nuisance, allowed to be-

come and remain so by the owner prior to and at the time of the lease, and hence that the owner must answer as for a nuisance. This proposition cannot be assented to. Some things may be nuisances per se under all circumstances and as to all persons; other things are nuisances only under certain circumstances and as to certain persons. A slaughter-house may be a nuisance as to the owner's neighbors, but none at all as to his employés in the business. What may be a nuisance as to others may not be a nuisance as to one's lessee, and here we are dealing with lessee and lessor.

To constitute any particular thing a legal nuisance per se (apart from statute nuisances), as between lessor and lessee and the servants of the lessee, the thing itself must work some unlawful peril to health or safety of person or property—as defective cesspools, imperfect sewers and drains, walls and chimneys liable to fall, unguarded excavations, etc. A fixed, inert mass of metal upon a solid foundation upon one's own land, like this digester, was not in itself dangerous to anyone. The employés of the lessee could have worked around and near it without any danger from it to person or health, so long as it was let alone. The danger arose ³⁰⁸ only when the lessee, the employer, began to make use of the digester without first ascertaining its tensile strength and gauging the applied force accordingly. Indeed, the plaintiff has once alleged, and recovered judgment upon proof, that the misconduct of the lessee caused the peril and injury complained of. This is inconsistent with her present contention that the digester was a nuisance per se as to her intestate, the lessee's employé.

The question of what is a nuisance upon leased premises was considered at some length with citation of authorities in *McCarthy v. York County Sav. Bank*, 74 Me. 315; 43 Am. Rep. 591. It was there held that a discharge pipe insufficient to vent the water flowing into a bowl from a faucet, so that the water overflowed the bowl and caused damage, was not a nuisance as to the tenant. See, also, *Brightman v. Bristol*, 65 Me. 426; 20 Am. Rep. 711; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373; 46 Am. Rep. 400, and *Leavitt v. Bangor etc. R. R. Co.*, 89 Me. 509, though those were not cases between lessor and lessee.

We have hitherto confined our citation of authorities to the decisions in this state, thinking they sufficiently showed our law to be against the plaintiff's contentions. She has, however, cited cases from other states, of which one or two nota-

bly support her contentions: *Stenberg v. Willcox*, 96 Tenn. 163; *Hines v. Wilcox*, 96 Tenn. 148; 54 Am. St. Rep. 823; 34 L. R. A. 615, 824. As to these cases, the learned editor of the *Lawyers' Reports, Annotated*, series says they are a new departure in the law, that they transfer to the landlord a duty which has heretofore rested upon the tenant—the duty of taking active care to find out unknown and unsuspected defects. As we have said above, we think it is for the legislature, not the court, to make this transfer of duty if thought desirable.

On the other hand, many courts in late decisions adhere to the long-established rule of *caveat emptor*. In *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, a boiler defective in construction exploded. In *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 249, 50 Am. Rep. 659, a gallery defective in construction fell. In *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 414, a house was too weak structurally to resist snowslides known to the lessor to be recurrent and dangerous. In ³⁰⁰ *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, a floor defective in construction fell. In *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, a stairtread had been sawed. The lessor knew of the sawing, but supposed the tread sufficient. In *Kern v. Myll*, 94 Mich. 477, a well had been used as a cesspool and thus had become offensive. In *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767, fixtures put up by the lessor were structurally defective and fell. In *Willson v. Treadwell*, 81 Cal. 58, a stairway was defective. In *Texas etc. Ry. Co. v. Mangum*, 68 Tex. 342, a defective platform fell. In *Fellows v. Gilhuber*, 82 Wis. 639, an unsafe awning fell upon a guest. In *McConnell v. Lemley*, 48 La. Ann. 1433, 55 Am. St. Rep. 319, a defective gallery fell upon a guest. In *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, defective machinery in a mill gave way. In all these cases, it appearing that the lessor was unaware of the defects, it was held that he was not liable to the lessee or his servants for the injury occasioned by them.

Motion and exceptions sustained.

LANDLORD AND TENANT—DEFECTS IN PREMISES—RIGHTS OF PARTIES.—A landlord does not insure the safety of the premises, nor does he impliedly warrant them to be inhabitable or fit for certain uses, and, as a general rule, the tenant under the maxim, *caveat emptor*, assumes all risks incident to the occupancy: *Hamilton v. Feary*, 8 Ind. App. 615; 52 Am. St. Rep. 485, and note. The maxim of *caveat emptor* applies between lessor and lessee; and it is for the latter to make the examination necessary to determine whether the premises are sufficient and are adapted to the purposes for which they are leased: *Clifton v. Montague*, 40

W. Va. 207; 52 Am. St. Rep. 872, and note. But the landlord must not be guilty of concealment of any defects: *Blake v. Dick*, 15 Mont. 236; 48 Am. St. Rep. 671, and note. But see *Lindsey v. Leighton*, 150 Mass. 285; 15 Am. St. Rep. 190. As to the landlord's liability for injury to the tenant's servants caused by defective appliances, see *Poor v. Sears*, 154 Mass. 539; 20 Am. St. Rep. 272, and note.

LANDLORD AND TENANT—NUISANCES—LIABILITY FOR. If there is no nuisance, either active or dormant, at the time of the demise, but a nuisance occasioning injury to a third person is caused by the lessee's negligent use of some part of the premises, such use not being expressly or impliedly intended or authorized by the lessor, he is not liable if he is under no agreement to repair: See monographic note to *Lowell v. Spalding*, 50 Am. Dec. 781; *Franklin v. Brown*, 118 N. Y. 110; 26 Am. St. Rep. 744; *Lufkin v. Zane*, 157 Mass. 117; 34 Am. St. Rep. 262, and note.

SNOW v. ULMER.

[91 MAINE, 324.]

MORTGAGE OF CHATTELS—DATE AS A PART OF THE DESCRIPTION OF THE PROPERTY.—If a mortgage is dated and purports to include all the articles, fixtures, and merchandise in a designated building, the date must be accepted as a part of the description. Hence the mortgage cannot include property not in the building at that date, though therein at the time when the mortgage was in fact executed and delivered.

C. E. and A. S. Littlefield, for the plaintiff.

W. H. Fogler and M. A. Rice, for the defendant.

³²⁴ **HASKELL, J.** Trover against an attaching officer by a mortgagee, and the only question involved is whether the goods attached were covered by the mortgage.

Now, as said by plaintiff, a mortgage takes effect from the time of its delivery, regardless of its date: *Egery v. Woodward*, 56 Me. 45; *Jones v. Roberts*, 65 Me. 273. This mortgage was delivered after the goods had been deposited in the debtor's store and before the attachment. But it is contended that the description of the property mortgaged did not include the goods attached. The mortgage was dated November 18th, and executed, delivered, ³²⁵ and recorded November 19th, after the goods had reached the store that morning. They were not in the store November 18th, at the date of the mortgage, which describes the property: "All the stock, fixtures, and merchandise in the store No. 273 Main street, in said Rockland."

The record held out that property only in the store at the

date of the mortgage was conveyed. The date became a part of the description of the property mortgaged, and it can make no difference that the mortgage was not executed until the next day, or the next week, or the next month, or the next year, when it may have actually been delivered and recorded. It would then only cover property described in it, and the description is of goods actually in the store at its date, not of goods afterward put there, and its date was before the goods were put in. The doctrine of this opinion logically follows from our own cases, although neither one of them exactly fits the contention here raised: *Sawyer v. Long*, 86 Me. 541; *Stirk v. Hamilton*, 83 Me. 524; *Griffith v. Douglass*, 73 Me. 532; 40 Am. Rep. 395; *Chapin v. Cram*, 40 Me. 564.

The case of *Partridge v. White*, 59 Me. 564, is substantially in point. It was there held that a mortgage of goods "now in my store" covered only goods then there, inferentially, at the date shown upon the face of the mortgage and the record thereof.

Judgment for defendants.

CHATTEL MORTGAGE—DATE AS PART OF DESCRIPTION. A description in a chattel mortgage as all goods "now in the store occupied" by the mortgagor is sufficient if supplemented by parol proof of what goods were in the store at the execution of the mortgage: *Burdett v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Harding v. Coburn*, 12 Met. 333; 46 Am. Dec. 680, and note; *Conkling v. Shelley*, 28 N. Y. 360; 84 Am. Dec. 348. Such a mortgage will include all the goods contained therein at the time the mortgage was executed: See monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 245.

WING v. MILLIKEN.

[91 MAINE, 387.]

COTENANTS—LIABILITY OF FOR CONVERSION.—A cotenant may be liable for the conversion of the property of the cotenancy. His part ownership is available only by abatement or in diminution of damages.

COTENANT—CONVERSION BY—WHAT IS.—A cotenant who contracts to sell timber belonging to the cotenancy, and directs the purchaser to the place where it is and as to the steps to be taken to accomplish its removal, and who receives the purchase price therefor, is guilty of its conversion.

PRINCIPAL AND AGENT.—A wrong done by an agent cannot be justified on the ground that it was directed by his principal. In an action of trover, it is no defense that the defendant acted as the agent or servant of another who was himself a wrongdoer.

TROVER—CONVERSION BY AN AGENT.—One who exercises a dominion over personal property in exclusion or defiance of,

or inconsistent with, the owner's right, is guilty of a conversion, whether he acted for himself or for another.

THE MEASURE OF DAMAGES IN AN ACTION OF TROVER is the value of the property at the time of conversion, with interest.

TROVER—MEASURE OF DAMAGES WHERE THE VALUE OF PROPERTY HAS BEEN ENHANCED BY THE WRONGDOER.—Where timber is cut by a wrongdoer and subsequently carried away, the owner is not restricted in his damages to the value of the timber before it was cut, but may, in an action of trover, recover its value at the time and in the condition in which it was carried away.

J. A. Morrill, for the plaintiff.

J. P. Swasey and E. M. Briggs, for the defendant.

³⁸⁸ FOSTER, J. Trover to recover the value of one hundred and fifty thousand feet of sawed birch spool lumber. The lumber in question was cut upon lots 2, 3, and 101, in Franklin plantation, by one George B. Staples, who was owner in common with the plaintiff—the plaintiff's interest being two-thirds undivided of the lots above named. Staples had an interest in other adjoining lands, and the winter's operation amounted to about one thousand cords cut and hauled to Staples' mill in the plantation, and there manufactured into spool strips. It appears that two hundred and forty or two hundred and forty-five cords of this amount was cut and hauled from land of which the plaintiff owned two-thirds in common. The cutting by Staples' men upon this land owned in common was unintentional, but wholly without the plaintiff's knowledge or consent.

It is not claimed that there was any conversion by this defendant until it was manufactured into spool stock. There is no testimony that the defendant exercised any dominion or control over the birch until after it had been sawed up and stacked ready for sorting and shipment.

The fact that the plaintiff was tenant in common with others of ³⁸⁹ the property converted constitutes no legal defense to this action, and it is available only in abatement, or by apportionment of the damage: *Holmes v. Sprowl*, 31 Me. 73, 76.

The defendant had a contract with Clark & Service of Glasgow, Scotland, to sell them two hundred thousand superficial feet, board measure, of white birch spool bars for export. This company was afterward reorganized and become incorporated as Clark, Skillings & Co., Limited, and was doing business in Glasgow and in Boston. The new company assumed

and signed the contract made by Clark & Service with the defendant. An agent of the latter company by the name of Bryant was sent to the defendant for directions where to find the spool lumber which he was to inspect and bunch under the contract with Clark, Skillings & Co., Limited. The defendant sent him to the place where the lumber was stacked, and put him in charge "to cull it and ship it." Acting as the agent of that company, he inspected, culled, and bunched the lumber and took all that was of a quality that complied with the contract which his firm held, amounting in all to one hundred and eighty-seven thousand six hundred and twenty-seven feet. This agent took his directions from the defendant. It is clear from the evidence that the defendant, when this agent went there, exercised full control and ownership over the spool stock, gave directions what to do, and that prior to that time he had had nothing to do with the lumber.

The testimony further shows that the defendant also sold from the lumber, after it had been culled, to Merrill & Co., of Dixfield, one hundred and seven thousand two hundred and sixteen feet.

Here, then, was a conversion by the defendant of the lumber in which the plaintiff had an interest, unless some justification can be shown. No justification is shown by any license or permission from the plaintiff.

It is contended, however, that the defendant was acting as the agent of his brother, Charles R. Milliken, who had succeeded to the interest of George B. Staples in the birch in which the plaintiff was interested. But if this contention be true, it affords no protection to him. This court has held that, in an action of trover, it is no defense that the defendant acted as the agent or servant of ³⁹⁰ another who was himself a wrongdoer: *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772. And it is there held that if he has exercised a dominion over personal chattels in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use: *Kimball v. Billings*, 55 Me. 147, 151; 92 Am. Dec. 581; *Freeman v. Underwood*, 66 Me. 229, 233. The same doctrine is laid down in other jurisdictions: *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174. In some of these cases it has been held that an auctioneer, or broker, who sells property for one

who has no title, and pays over to his employer the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner: *Robinson v. Bird*, 158 Mass. 357, 360; 35 Am. St. Rep. 495.

The acts of the defendant in reference to this lumber, in causing it to be sorted, culled, and bunched, and a large portion of it thereafter sold to two different parties by this defendant, constituted acts of dominion and ownership over the same in exclusion, defiance of, or inconsistent with, the plaintiff's interest and ownership therein.

Nor do we think from the testimony as reported that the plaintiff is estopped, by any transactions of his with George B. Staples in relation to the taking of timber from other lands in which they were interested, from maintaining this action against the defendant. From those acts in reference to other logging transactions, even though the plaintiff was interested with Staples therein, there was no such relation of the parties as would authorize any one legitimately to infer that Staples was the plaintiff's agent in reference to this lumber in question, and to deal with him as with one clothed with authority, or to be justified in believing that he had authority to make any disposition of it to the exclusion of the plaintiff's rights. The facts reported create no estoppel as against the plaintiff. This property in question was never, through any act of the plaintiff, placed in the hands of Staples, or this defendant, as bailee or otherwise, for the purpose of being disposed of, ³⁹¹ thereby creating an estoppel against the plaintiff from asserting any rights against a bona fide purchaser.

The only remaining question is in relation to damages.

The defendant's acts of dominion and ownership had reference to the two hundred and forty or two hundred and forty-five cords of lumber, notwithstanding he participated in the sale of but two lots—that to Clark, Skillings & Co., Limited, and to Merrill Co. The whole was culled in order to obtain the amount which was sold to Clark, Skillings & Co., Limited, and the entire quantity was thereby greatly diminished both in quality and value. The remainder, after these sales, was disposed of by Charles R. Milliken to two other parties.

The measure of damages ordinarily in an action of trover is the value of the property at the time of conversion, with in-

terest from the time when the cause of action accrues: *Washington Ice Co. v. Webster*, 62 Me. 341, 362; 16 Am. Rep. 462; *Johnson v. Sumner*, 1 Met. 172, 179; *Glaspy v. Cabot*, 135 Mass. 435, 440.

In the present case, we are unable to perceive any reason for departing from the general rule, and allowing damages only for the value of the birch when severed from the land, as contended by the defendant.

We have given the question considerable attention, and examined the authorities relied upon in support of the proposition set up in reduction of damages, but we feel that the present case is one where any rule other than the value of the property at the time of conversion does not apply.

It has sometimes been held that where timber has been cut by trespassers, and the trespass was involuntary and not willful, the owner should recover his actual loss, and not the increased value added by the trespasser. Such was the case of *Foote v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; but that was an action of trespass *quare clausum* and not an action of trover, and in the course of the opinion the court say that the plaintiff might have maintained replevin for the timber, or he might "have recovered its full value at the time it was carried away by bringing trover."

Another case from the same court is *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426; which was an action of trover by the owner to recover the ³⁹² value of two hundred spruce logs cut by the defendant and hauled to his mill, and the court in an elaborate opinion held that the measure of damages was the value of the trees immediately after they were severed from the realty, without any increased value added for transporting them to defendant's mill. There the trespass was not willful, and the cutting over on plaintiff's land was by mistake. But it will be noticed that the suit was against the trespasser, and the court say that "the defendant converted the logs by cutting and severing the trees from the land, and the conversion being complete by that wrongful act, their value there represents the plaintiff's loss," and held that the damages must be according to the usual rule in trover, which is the value of the property at the time of conversion and interest after.

The recent case of *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304, was an action of trover against a purchaser of sleepers made from trees cut on the plaintiff's land by a trespasser,

and by him manufactured into sleepers, and the rule of damages was held to be the value of the sleepers at the time of their conversion by the purchaser, and no deduction was made for the increased value put upon the trees by the labor of the trespasser before conversion by the purchaser.

The case of *Glaspy v. Cabot*, 135 Mass. 435, was an action of tort in the nature of trover, and the same rule was applied. In that case the master of a vessel, which had drifted upon a beach in a damaged condition, sold her, without right, to a person who, after repairing her, getting her off, and taking her into port, sold her hull to another person. The action was by the owner against the latter, and the court there held the measure of damages to be the value of the hull at the time and place of conversion, with interest thereafter. And the court there say, as was said by the court in *Powers v. Tilly*, 87 Me. 34, 47 Am. St. Rep. 304, that in replevin for the same property any improvements upon it attach to and go with the property replevied to the owner, and that "the rule of confining the damages to the time of the conversion, with interest from that time, has been adopted in our commonwealth as the most satisfactory; and many difficulties are avoided which arise under any other rule, when the value of the property is fluctuating, or when ³⁰³ the property has been improved in value or changed in form by the wrongful taker after the conversion and before the trial. In the event of successive conversions, if the value of the property at the time of the first conversion were always taken as the test of damages, then it might often happen that a defendant who had subsequently converted the property could be held to pay more than the property was worth when he converted it. The damages caused by one wrong would be measured by those caused by another."

If we examine the earlier decisions in our own state we find no real conflict with the doctrine here enunciated. The case of *Cushing v. Longfellow*, 26 Me. 306, was an action of trespass *de bonis* for mill logs, and the plaintiff waived the breaking and entering and the cutting, and there it was held that the measure of damages was the value as it was the moment after they were severed, and that the plaintiff had no right to select any other place than that where the injury was originally done, although he might have replevied the logs at a later stage after they had become more valuable; and the opinion of the court

states he "might have demanded them at another place, of one having them there, and in an action of trover have recovered the value of them there." This, certainly, is in accordance with the general rule of damages, the value at time of conversion.

So in *Moody v. Whitney*, 38 Me. 177, 61 Am. Dec. 239, which was trover for mill logs cut upon the plaintiff's land by the defendant, and hauled by him two or three miles, the same measure of damages was adopted, it being held that the plaintiff could not recover the enhanced value of the logs without evidence of a distinct conversion after they were hauled, as if the plaintiff had regained possession, and there had been a subsequent conversion by the defendant. In this case the court recognized and approved the general rule, and held that the conversion by the defendant was at the time of his cutting the timber, and therefore the damages were necessarily the value immediately after it was cut, and had become personal property.

The distinction in these cases to which we have referred, and ³⁹⁴ the case at bar, should be borne in mind—the time when the conversion by the defendants took place—and when that is done, and the rule applied, much of the seeming difficulty in the application of the rule vanishes. The trouble is not in the rule, but in applying it to the facts of each particular case. Facts which may be held to constitute conversion in one case may so vary in another as to lead the court to conclude that conversion took place at an entirely different time, and with a material difference, therefore, in the amount of damages to be awarded.

In the case at bar, the conversion by the defendant was not when the timber was cut or severed from the realty. It was not until after the same had been hauled from the land and sawed into spool timber, and this action is brought for converting that lumber after it was sawed and stacked. Staples, who cut the birch from the land, was a tenant in common with the plaintiff, not only of the land from which it was cut, but also tenant in common of the birch after it was landed at the mill. There was no interference by the defendant, nor acts constituting conversion by him, till it was sawed. The plaintiff might have brought replevin for the same, and thereby have acquired the benefit of whatever labor had been bestowed upon it. Thus cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars may be reclaimed by the original owner in their improved condi-

tion. Viner's Abridgment, tit. Property (E), pl. 5; Curtis v. Groat, 6 Johns. 168; 5 Am. Dec. 204; McLarren v. Brewer, 51 Me. 402. The law neither divests him of his property nor requires him to pay for improvements made without his authority. It is only when the identity of the original material has been destroyed, or its value insignificant compared with the article manufactured from it, that the law is otherwise: Wetherbee v. Green, 22 Mich. 311; 7 Am. Rep. 653. To say that the owner may retake the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions, and, ³⁹⁵ as said by Strout, J., in Powers v. Tilley, 87 Maine 34, 47 Am. St. Rep. 304, would relieve trespassers from all loss, and would tend to encourage wrong doing.

We are not unmindful that a somewhat modified rule has been laid down by the supreme court of the United States in the case of Wooden Ware Co. v. United States, 106 U. S. 432, which was an action of trover for ash timber cut from government lands in the state of Wisconsin by willful trespassers, and sold to purchasers against whom the action was brought. But notwithstanding the doctrine thus modified by the court in that case, and as applied to the facts therein stated, we see no reason for departing from the rule so long established and adhered to by the decisions of our own court, and the courts of other states, in the decisions to which we have referred. As said by the court of Massachusetts in Glaspay v. Cabot, 135 Mass. 435, 440, "the general principle is, that damage should compensate the plaintiff for what he has lost. The rule confining the damages to the time of the conversion, with interest from that time, has been adopted in this commonwealth as the most satisfactory; and many difficulties are avoided which arise under any other rule."

From the evidence before us, and with the rule as herein enunciated, we are satisfied that the damages to be recovered by the plaintiff for his two-thirds interest in the property converted should be one thousand and fifty dollars.

Judgment accordingly.

COTENANCY—CONVERSION BY COTENANT.—If one cotenant appropriates to his own use the whole of the proceeds of a sale of the common property without the consent of the other, the latter is entitled to treat the appropriation as a conversion, and to main-

tain an action therefor: *Knope v. Nunn*, 151 N. Y. 506; 56 Am. St. Rep. 642, and note; monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 817, 818. Or the action may be maintained against the vendee of the common property: *King v. Neel*, 98 Ga. 438; 58 Am. St. Rep. 311, and note.

TROVER—CONVERSION BY AGENT.—Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent therewith, is, and may be treated as, a conversion: *Carpenter v. American Bldg. etc. Assn.*, 51 Minn. 403; 40 Am. St. Rep. 345, and note; *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341, and note. And it is well settled that one who has been guilty of an act whereby the chattels of another have been converted cannot evade liability therefor by proving that he acted innocently as the agent of another: See monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 812; *Swim v. Wilson*, 90 Cal. 126; 25 Am. St. Rep. 110, and note.

TROVER—MEASURE OF DAMAGES IN—ENHANCEMENT OF PROPERTY BY WRONGDOER.—The measure of damages in trover is the value of the property at the time of the conversion, with interest from the time of conversion: *White v. Martin*, 1 Port. 215; 26 Am. Dec. 365, and note; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Omaha etc. Co. v. Tabor*, 13 Colo. 41; 16 Am. St. Rep. 185, and note. The question as to the proper measure of damages in trover, where the property converted has been enhanced in value since its conversion, is one upon which American courts are not agreed. It is generally conceded that in cases of willful wrong such enhanced value is recoverable, but upon this proposition the courts are not unanimous; and in cases wherein the rights of innocent purchasers intervene, or where the conversion was through mistake, or where the property has undergone such change in form as to have lost its identity, the cases are still more at variance: See monographic notes to *Baker v. Wheeler*, 24 Am. Dec. 70-88; *Franklin Coal Co. v. McMillan*, 33 Am. Rep. 282-286; *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769; *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Isle Royal Min. Co. v. Hertin*, 37 Mich. 332; 26 Am. Rep. 520, and extended note; *White v. Yawkey*, 108 Ala. 270; 54 Am. St. Rep. 159.

ROADS v. WEBB.

[91 MAINE, 406.]

CONTRACT—PLACE WHERE DEEMED MADE.—Where an assignment of notes and of a mortgage by which their payment was secured was signed in one state, and then forwarded to another, where the assignee received and made payment therefor, the contract must be regarded as made in the latter state.

NEGOTIABLE INSTRUMENTS.—If a note purports to be payable on or before a specified date, this uncertainty in the time of payment destroys its negotiability in some of the states, but not in others.

NEGOTIABLE INSTRUMENTS—ATTORNEYS' FEES.—A note for a sum specified and attorneys' fees is not a negotiable instrument.

CONFLICT OF LAWS—LAW OF THE PLACE OF THE CONTRACT—WHEN DOES NOT CONTROL.—Where the general principles of the common law are to be applied to a contract, the

court of the forum will apply those principles according to its judgment, notwithstanding it may have been held differently where the contract was made.

NEGOTIABILITY OF INSTRUMENTS, BY WHAT LAWS CONTROLLED.—Though an instrument is deemed negotiable by the law of Indiana, in which state it was executed and negotiated, the courts of Maine will not, in an action thereon in that state, follow the decisions of Indiana, where they are dependent upon the determination of what were the common-law rules applicable to the subject.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—PAROL EVIDENCE TO VARY.—Where a note negotiable on its face is indorsed in blank by a payee, parol evidence is admissible to show an agreement between the parties that the endorser will not be holden.

NEGOTIABLE INSTRUMENTS — INDORSEMENT BY PAYEE—WHEN AMOUNTS TO A SALE ONLY.—If notes are sold by the payee for much less than their face value, and the indorsee does not, for a long time after they fall due and are dishonored, make any claim that the vendor is liable as indorser, the court should find that it was the understanding of the parties that the indorsement was only for the purpose of transferring the title and without intending that the purchaser should be liable upon his indorsement.

Franklin C. Payson and Harry R. Virgin, for the plaintiff.

E. Woodman and T. L. Talbot, for the defendant.

⁴⁰⁸ **STROUT, J.** This case comes before us upon demurrer to the declaration, and an agreed statement of facts, upon which the court is to render "such final judgment as law and justice will require." The consideration of the demurrer, under this submission, becomes unimportant.

The plaintiff claims to recover from the estate of James Webb, ⁴⁰⁹ the defendant's intestate, as indorser of two notes for eleven hundred dollars each, both dated September 29, 1892, now held by plaintiff. The first reads as follows:

"\$1,100.00.

Muncie, Ind., Sept. 29, 1892.

On or before one year after date we promise to pay to the order of James Webb eleven hundred dollars with six per cent interest per annum from date and attorney's fees. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note. Negotiable and payable at the Citizens' National Bank of Muncie, Indiana. With eight per cent interest after maturity until paid.

U. S. GERRELLS,
"W. H. MASTERS."

The second note is of precisely the same tenor, except payable on or before two years.

On the back of each note is the following:

"For value received, I, James Webb, hereby assign, transfer, and deliver unto Hardin Roads of Muncie, Indiana, or his order, all my right, title, and interest in and to the within note, and the mortgage securing the same. JAMES WEBB."

Both notes were secured by mortgage upon real estate in Muncie, sold by Webb to Gerrells and Masters, through one W. L. Lyons, a real estate and insurance broker at Muncie. This sale was for three thousand three hundred dollars, one-third of which was paid in cash, and the remaining two-thirds by the two notes sued, secured by a mortgage of the same real estate. Soon after the notes were received by Webb he employed Lyons "to sell the same, and within a few months thereafter negotiated a sale of the notes and the mortgage securing the same, through said Lyons to Hardin Roads of said Muncie, the plaintiff, for the sum of two thousand dollars." During the entire transaction, Webb was a resident and citizen of Maine, and Lyons and Roads were at Muncie, and residents of Indiana. The writing upon the back of the notes was ⁴¹⁰ placed there by Webb, in Maine, as also the written assignment of the mortgage. "Both mortgage and notes were then forwarded by mail by Webb to Lyons, who received payment therefor from the plaintiff at said Muncie, and remitted the same to Webb at Bridgton, Maine."

The papers being delivered to Roads and payment received at Muncie, the contract must be regarded as made in Indiana. The notes were not paid by the makers, and the plaintiff realized on sale of the mortgaged estate six hundred dollars, and claims the balance in this suit.

It is objected that the relation of indorser and indorsee does not exist between the parties, because the notes were not negotiable by the law merchant; and that the plaintiff is but an assignee of a non-negotiable chose in action, and cannot maintain this suit against Webb's estate.

In Indiana, the negotiability of notes depends upon a statute which provides that "notes payable to order, or bearer, in a bank in this state shall be negotiable as inland bills of exchange and the payee and indorsee thereof may recover as in case of such bills": Rev. Stats. 1881, sec. 5506. Under this statute the Indiana court holds that all notes payable to order, or bearer, in a bank in that state, are, if in other respects they comply with the requirements of the law merchant, negotiable under the law merchant: *Melton v. Gibson*, 97 Ind. 158. In *Pool v. Ander-*

son, 116 Ind. 92, it is said that "so far as the statute places promissory notes upon the footing of inland bills of exchange, it subjects them to the law merchant, and all its incidents."

A valid promissory note is not necessarily negotiable. To make it such by the law merchant, it must run to order or bearer, be payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency.

These notes were payable "on or before" a named date, and were for a definite sum of money, with interest "and attorney's fees." The later cases in Massachusetts hold that when the time of payment is on or before a certain date, the time of payment is ⁴¹¹ thereby made uncertain, and for that reason such a note is not negotiable: *Hubbard v. Mosely*, 11 Gray, 170; 71 Am. Dec. 698; *Way v. Smith*, 111 Mass. 523. These cases have been since followed in that jurisdiction, though the earlier case of *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464, held differently. But in other jurisdictions it has been held that these words reserved an option only to the maker to pay before maturity, that payment could not be required till the time specified, nor the note dishonored till then; and therefore it was, in contemplation of the law merchant, payable at a time certain: *Bates v. Le Clair*, 49 Vt. 229; *Ernst v. Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542; *Albertson v. Laughlin*, 173 Pa. St. 525; 51 Am. St. Rep. 777; *First Nat. Bank v. Skeen*, 101 Mo. 683; *Palmer v. Hummer*, 10 Kan. 464; 15 Am. Rep. 353; *Curtis v. Horn*, 58 N. H. 504; *Cisne v. Chidester*, 85 Ill. 523; *Woollen v. Ulrich*, 64 Ind. 120. The question has not been decided in this state, and we do not now decide it.

A more formidable objection is in the provision for the payment of "attorneys' fees." It is said that if the note should be paid at maturity there would be no attorneys' fees. This is true. But a note which, by its terms, is negotiable under the rules of law, does not lose that characteristic until merged in a judgment. The only infirmity attending its negotiation after maturity is that the indorser takes it subject to the same defense that the maker could have made against the original payee. A note cannot be negotiable before maturity and not negotiable after that, by reason of the terms of the note itself. After these notes were dishonored and had been placed in an attorney's hands, his fees commenced to run. How much they would amount to depended upon the service then rendered and to be

rendered. But, until merged in judgment, they were still negotiable, if negotiable at any time after their creation. Hence arose an uncertainty in the amount due. That uncertainty attached to the notes in their inception, although attorney's fees would not accrue until after dishonor. The notes provided for the payment of such uncertain fees, in case they should accrue, and thus rendered the amount the makers were liable to pay in one event uncertain. This infirmity destroyed ⁴¹² the negotiable quality of the notes: *Altman v. Rittershofer*, 68 Mich. 287; 13 Am. St. Rep. 341. It has been held in this state that a note payable to order for a sum certain and another sum which is contingent is not negotiable: *Dodge v. Emerson*, 34 Me. 96. So a note to an insurance company, or order, for a certain sum "and such additional premiums as may become due" on a policy named, is not negotiable: *Marrett v. Equitable Ins. Co.*, 54 Me. 537. In that case the additional premiums would be definite, when required; while in the case at bar, the amount of the attorney's fees remains an uncertain quantity until the note should be finally paid: See, also, *Lime Rock etc. Ins. Co. v. Hewett*, 60 Me. 407. These notes fail to contain such definite amount to be paid as is required by the law merchant to render them negotiable. It is so held in many states. In *Woods v. North*, 84 Pa. St. 409, 24 Am. Rep. 201, the note was for a specified sum "and five per cent collection fee if not paid when due." The court held it not negotiable. So held in Missouri: *First Nat. Bank v. Gay*, 63 Mo. 33; 21 Am. Rep. 430; and in Wisconsin: *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781; in Michigan: *Altman v. Rittershofer*, 68 Mich. 287; 13 Am. St. Rep. 341; in Minnesota: *Jones v. Radatz*, 27 Minn. 240; in Maryland: *Maryland Fertilizing etc. Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 750; in California: *Kendall v. Parker*, 103 Cal. 319; 42 Am. St. Rep. 117; in North Carolina: *First Nat. Bank v. Bynum*, 84 N. C. 24; 37 Am. Rep. 604; and in South Carolina: *Carroll County Sav. Bank v. Strother*, 28 S. C. 504.

It is held otherwise in Indiana: *Stoneman v. Pyle*, 35 Ind. 103, 9 Am. Rep. 639, and in some other states.

It is urged that, because this is an Indiana contract, we must apply the doctrine of the Indiana court to it. We do not so understand the law. It is true that the *lex loci contractus* governs as to the validity and construction of the contract. But the *lex fori* governs as to all matters pertaining to the remedy. That law governs as to the negotiability of the contract, because upon it depends the question who has a right of action: *Pear-*

sall v. Dwight, 2 Mass. 90, 3 Am. Dec. 35. See, also, *McRae v. Mattoon*, 10 Pick. 53; ⁴¹³ *Warren v. Copelin*, 4 Met. 597; *Foss v. Nutting*, 14 Gray, 485; *Leach v. Greene*, 116 Mass. 534.

But if this were not so, yet where the general principles of commercial law are to be applied to a contract, the court of the forum will apply those principles according to its judgment, notwithstanding it may have been held differently where the contract was made.

The supreme court of the United States, under the judiciary act of 1789, re-enacted in the Revised Statutes, which provides "that the laws of the several states, except where the constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States; in cases where they apply," has uniformly held that it was bound by the decisions of the state court which furnished rules of property, or construed a state statute; yet it was said by that court in *Chicago v. Robbins*, 2 Black, 428, that "where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions." That court has ever since adhered to that doctrine: *Norton v. Shelby County*, 118 U. S. 440; *Gormley v. Clark*, 134 U. S. 348; *Stutsman County v. Wallace*, 142 U. S. 306; *Pine Grove v. Talcott*, 19 Wall. 677; *Scudder v. Union Nat. Bank*, 91 U. S. 412; *Pritchard v. Norton*, 106 U. S. 130. It has been so held in Massachusetts: *Richards v. Barlow*, 140 Mass. 220; and in Iowa: *National Bank v. Green*, 33 Iowa, 146.

The statute of Indiana places notes payable in bank upon the footing of inland bills of exchange. To them the law merchant, with all its incidents, is to be applied. So held in Indiana, in *Pool v. Anderson*, 116 Ind. 92. The law merchant, by adoption, and the statute of 3 & 4 Anne, chapter 9, are part of our common law, which regulate and control the vast transactions in commercial paper. In that domain, we apply the law to subjects affected by it, which are litigated here, having great respect for the decisions of other tribunals, but not controlled by them.

⁴¹⁴ We hold these notes not negotiable. Plaintiff, therefore, cannot maintain this action.

Another defense is interposed which must prevail, even if it should be conceded that these notes were negotiable under the law merchant. Where a note, negotiable on its face, is indorsed

in blank by the payee, the law implies an agreement by the payee, in case the note is not paid at maturity, on proper demand and notice, that the indorser will pay it to the holder. But this implied contract is only *prima facie*. It may be rebutted. In a suit by the indorsee against the indorser, the latter may show that the understanding and agreement between the parties was that the indorser should not be holden. The law does not imply a contract where an express one has been made. He may prove the express contract by parol evidence, or it may satisfactorily appear from the transaction itself: *Patten v. Pearson*, 55 Me. 39; *Smith v. Morrill*, 54 Me. 52; *Patten v. Pearson*, 57 Me. 431; *Pool v. Anderson*, 116 Ind. 92. A note may be sold, as other goods and effects are. In such cases there is no implied warranty of the solvency of the maker. The law respecting the sale of goods is applicable: *Milliken v. Chapman*, 75 Me. 317; *Bicknall v. Waterman*, 5 R. I. 43; *Beckwith v. Farnum*, 5 R. I. 230. See *Hussey v. Sibley*, 66 Me. 196; 22 Am. Rep. 557. If the paper is payable to bearer, it may be sold and transferred by delivery; but if payable to order, it must be indorsed to enable the holder to pursue his remedy in his own name. The usual way to indorse, in such case, is without recourse. But even if indorsed in blank, where the law implies the ordinary liability of an indorser, it is still an open question between the parties to the transaction whether the actual contract was a sale, the purchaser relying upon the responsibility of the maker alone, or otherwise.

Applying this principle to the facts of this case, it is apparent that the transaction between Webb and the plaintiff was a sale of these notes, by which the purchaser took the notes relying solely upon the responsibility of the makers, and the security of the mortgage, with no claim against Webb as indorser.

Webb was a resident of Maine. The sale of the land to ⁴¹⁵ Gerrells and Masters was effected by a broker in Muncie. It does not appear that Webb had any knowledge of the purchasers or their responsibility. Presumably he did not. He apparently wanted not only to sell the land in the first place, but to relieve himself of all trouble thereafter in connection with it. Shortly after the receipt of these notes, Webb employed the same broker who effected the sale to Gerrells and Masters "to sell the same," in the language of the agreed statement; and within a few months thereafter Lyons "negotiated a sale of the notes and mortgage" to plaintiff. To effectuate the sale, Webb, a business man and presumably familiar with the method of ne-

gotiating commercial paper, instead of indorsing the notes in blank, wrote thereon an assignment of his right, title, and interest, and made an assignment of the mortgage in substantially the same language employed in the assignment of the notes. He sold them for two thousand dollars, when there was due upon them two thousand two hundred dollars, and interest from September 29, 1892, to the time of sale. One note became due September 29, 1893, and the other in September, 1894. The notes were not paid; but the plaintiff does not appear to have called upon Webb as indorser, during his life, which ended November 11, 1895, nor upon his administratrix till October 14, 1896, when the first notice of nonpayment was given. Meantime, plaintiff had sold the mortgaged property on August 3, 1895, for six hundred dollars, being himself the purchaser; and on July 8, 1895, had obtained a personal judgment against Masters for the amount of the notes, but collected nothing. Even if the waiver of demand and notice in the body of the notes bound the indorser, this delay on the part of the plaintiff is inexplicable, if he thought Webb liable as indorser. Upon all these facts, a jury would be justified in finding that the transaction between Webb and the plaintiff was a sale of the notes and mortgage as commodities, for what they were supposed to be worth, the purchaser relying solely upon the responsibility of the makers and the mortgage, with the understanding that Webb was under no liability as indorser. The acts of the plaintiff are inconsistent with any other view. Besides, if Webb desired to obtain money upon the notes, by discount in ⁴¹⁶ the usual way, he assuming the ordinary liability of an indorser, he could readily have done so in his home state. He need not have suffered a loss of more than two hundred dollars in the transaction. He evidently understood that he had sold the notes, and was under no further liability. The language of the transfer of the notes so implies. Its terms are express, and exclude any implied contract differing from it. We think the plaintiff so understood it, from the nature of the transaction, and his long delay in making claim, after dishonor of the notes and failure to collect of the makers, or to realize payment from the mortgage security.

As this case is submitted upon agreed facts, for the judgment of this court, we are at liberty to draw such inferences from them as a jury would be authorized to draw. And, doing so, we arrive at the conclusion that the understanding between Webb and the plaintiff was, that Webb should not be liable as in-

dorser, but that the plaintiff purchased the notes and mortgage, relying solely upon the responsibility of the makers and the mortgage security. He cannot now call upon Webb's estate to make good any loss he may have sustained: *Patten v. Pearson*, 57 Me. 431, 432.

Judgment for defendant.

CONTRACT—PLACE OF.—Where there are negotiations or various steps leading to the contract, the last of which is necessary before it can become a contract, it is not finally executed until that step has been taken, and wheresoever the other steps have been taken, the last only is regarded as giving the contract a place or locality, and it is therefore deemed executed at that place only where the final or last act of consent is given: See monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 45, on the place of the contract.

NEGOTIABLE INSTRUMENTS—PROVISIONS AFFECTING NEGOTIABILITY.—A promissory note providing that in case suit is brought thereon, the makers will pay such additional sum as the court may adjudge reasonable as attorney's fees, is not negotiable: *Kendall v. Parker*, 103 Cal. 319; 42 Am. St. Rep. 117, and note. *Contra*, *Oppenheimer v. Bank*, 97 Tenn. 19; 56 Am. St. Rep. 778; *Salisbury v. Stewart*, 15 Utah, 308; 62 Am. St. Rep. 934, and note; *Nicely v. Commercial Bank*, 15 Ind. App. 563; 57 Am. St. Rep. 245, and note. A promissory note is none the less negotiable because it is made payable on or before a named date: *Dorsey v. Wolff*, 142 Ill. 589; 34 Am. St. Rep. 99, and note; *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859, and note.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—PAROL EVIDENCE QUALIFYING.—Parol evidence is admissible to vary the prima facie effect of an indorsement in blank by showing an oral agreement made by the parties at the time of the indorsement: *Note to Holmes v. First Nat. Bank*, 41 Am. St. Rep. 738. See *Brewer v. Woodward*, 51 Vt. 581; 41 Am. Rep. 857; and compare *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383.

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—BY WHAT LAW DETERMINED.—Whether a note or inland bill of exchange is negotiable or not is governed by the *lex loci contractus*, although the remedy is governed by the law of the forum: *Corbin v. Planters' Nat. Bank*, 87 Va. 661; 24 Am. St. Rep. 673, and note; *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; *Emanuel v. White*, 34 Miss. 56; 69 Am. Dec. 385, and note; *Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413.

HASKELL v. DAVIDSON.

[91 MAINE, 488.]

THE OFFER OF A REWARD for the arrest and conviction of the person or persons who committed a designated crime is complied with and the reward earned by obtaining and giving to some interested person sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender; and subsequently to procure his conviction by a court of competent jurisdiction. Hence, it is no defense

to an action for such reward that the plaintiff did not arrest the criminal, if plaintiff discovered facts and circumstances tending strongly to inculcate the person who thereupon, being confronted with the charge by the plaintiff, made a full confession of his guilt, and afterward pleaded guilty to the indictment found against him.

H. H. Burbank and John C. Stewart, for the plaintiffs.

B. F. Hamilton and B. F. Cleaves, for the defendant.

⁴⁸⁹ WISWELL, J. Exceptions to the ruling of the justice, who heard the case without the intervention of a jury, that the defendant was liable upon the following facts, found by him.

The defendant was one of thirty citizens who agreed to pay ten dollars each as a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and ⁴⁹⁰ stole thirty-five dollars therefrom." The plaintiffs were informed of this offer, and were thereby induced to enter upon an investigation of the crime referred to. As a result of which facts and circumstances were discovered by them tending strongly to inculcate one Harry Thompson, who, upon being found and confronted with the charge by the plaintiffs, made a full confession of his guilt and subsequently pleaded guilty to the indictment found against him by the grand jury. But the formal arrest of the respondent, on the capias issued by the court, was made by a deputy sheriff. That officer makes no claim, however, as found by the court, to any part of the reward.

An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal.

An offer of a reward for "the arrest and conviction" of an offender cannot be taken literally. The person who, by reason of the offer, is induced to make an investigation, and finally obtains possession of sufficient facts to authorize the arrest of an offender and his subsequent conviction of the crime referred to in the offer, certainly cannot himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the

crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction.

In *Crawshaw v. Roxbury*, 7 Gray, 374, the offer was "for the apprehension and conviction." The court at nisi prius instructed the jury, in regard to the service to be performed to entitle the plaintiff to a reward, that the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be ⁴⁹¹ entitled to the reward by becoming the prosecutor, and, as such, causing the arrest and conducting the case to a conviction; or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender. This instruction was unqualifiedly sustained by the full court: See, also, to the same effect *Besse v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747.

In *Shuey v. United States*, 92 U. S. 73, a case relied upon by the counsel for the defendant, the offer of reward was, "for the apprehension of John H. Surratt, one of Booth's accomplices." Offer was also made of liberal rewards "for any information that shall conduce to the arrest of either of the above named criminals or their accomplices." The court held that the person who furnished the information to which the discovery and arrest of Surratt were entirely due, but who did not himself make the arrest, was not entitled to the reward offered for the apprehension, holding in that case that the arresting and giving information that led to the arrest were different things. There can be no question but that the construction of the offer of reward by the court was correct. The proclamation of the secretary of war in making the offer treated the arrest and the giving of information that would lead to the arrest as different, making an offer of a specified sum for the apprehension and of liberal rewards for information that would lead to the apprehension. That case is different from this in another important respect. There the offer was for the capture of a known person; here, what was desired was not the apprehension of a known criminal who was a fugitive from justice, but information which should show who was the unknown perpetrator of the crime.

Other defenses urged by the counsel are not based upon any facts found by the justice who heard the case.

We think that the ruling was correct, that the plaintiffs substantially performed the services required by the offer of re-

ward, so as to accomplish the entire object contemplated and desired by those making it.

Exceptions overruled.

REWARDS—WHEN EARNED.—An offer of a reward by public advertisement is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally: *Besse v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747. To entitle one to a reward offered for the "apprehension and conviction" of a criminal, his services must have been instrumental in procuring both the apprehension and conviction: *Fitch v. Snedaker*, 38 N. Y. 248; 97 Am. Dec. 791. See extended note to *Ryer v. Stockwell*, 73 Am. Dec. 638, 639; *Wilmoth v. Hensel*, 151 Pa. St. 200; 31 Am. St. Rep. 738; extended note to *Hayden v. Souger*, 26 Am. Rep. 5-10.

MORRISON v. WILDER GAS COMPANY.

[91 MAINE, 492.]

CORPORATIONS.—A DIRECTOR OF A CORPORATION AS SUCH HAS NO AUTHORITY to make contracts for it. Hence, there is no presumption that a contract purporting to be made in his name by him was authorized by it.

CORPORATIONS.—THE PRESENCE OF THE CORPORATE SEAL on a contract purporting to be executed by a corporation is not evidence that the person who affixed it was authorized to do so, or that the contract is the contract of the corporation.

W. H. Folger, for the plaintiffs.

D. N. Mortland and M. A. Johnson, for the defendant.

495 WISWELL, J. This action is to recover the purchase price of certain materials furnished by the plaintiffs for the construction of a gas plant at Rockland. The defendant denied that it had **496** ordered the goods, or received them, or that it had any connection whatever with the construction of the gas plant.

For the purpose of showing that the defendant did construct this plant, and that it received and used these articles in the construction, the plaintiffs were allowed to introduce in evidence, against the defendant's objection, a written instrument which purported to be executed by the defendant corporation, and which provided for the construction of the plant. The attestation clause and form of execution were as follows:

"In witness whereof, said Wilder Gas Company, by the hands of its chairman of the executive committee, Luke A. Wilder, thereunto duly authorized, has hereunto set its corporate name

and affixed its corporate seal, and said Knox Gas and Electric Company, by the hand of A. D. Bird, its Treasurer, thereunto duly authorized, has set its corporate name and affixed its corporate seal the year and day above written.

“THE WILDER GAS CO.,

“By LUKE A. WILDER,

“Chairman of Executive Com. [L. S.]

“KNOX GAS & ELEC. CO.,

“By A. D. BIRD, Treas. [L. S.]

Objection was made to the introduction of this instrument upon two grounds: because it was not a contract between the parties to the suit, and because there was no evidence showing that the contract had been authorized by the defendant corporation. We have no doubt that a contract between the defendant and the owner of the plant, if shown by competent testimony to have been authorized by the defendant, was admissible in evidence for the purpose for which it was introduced.

But was there any evidence showing that this instrument was the contract of defendant? The signature of Luke A. Wilder, and the fact that at the time he was a member of the board of directors and of the executive committee of the defendant corporation, were proved and admitted; but there was no evidence by record or otherwise, outside of the instrument itself, and the fact that it bore the corporate seal, that the contract was ever authorized by the corporation, or that Wilder had authority to execute this contract or contracts of this general description, or that the ⁴⁹⁷ executive committee or any member thereof had any authority to make contracts of this nature.

Some cases and text-writers have laid down the rule that the presence of the corporate seal upon an instrument that purports to be the contract of a corporation gives rise to a prima facie presumption that it was affixed by proper authority; while others very materially limit the rule by saying that when the seal is affixed by a proper official, in the line of his authority, it is evidence of the assent and act of the corporation.

Here the only proof was that Wilder was a director and member of the executive committee. But a director, as such, has no authority to make contracts for his corporation. He may of course have such authority—it may be either express or implied, and it may be shown by record or parol—but it does not follow that he had merely from the fact of his being a director. It is a familiar rule, which requires no citation of authority, that directors of a corporation, as such, have no implied au-

thority to act singly; they can only act as a board, unless there be an express or implied delegation of authority to act individually. So far as this case shows Wilder had no such authority; he was not the proper official, either to sign the corporate name or to affix the corporate seal; it was not within the line of his authority.

We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even *prima facie* evidence that a contract, signed and sealed by a person, who, so far as the case shows, had no authority to make or execute this or such a contract, was the contract of the corporation.

We very much prefer the doctrine laid down by Mr. Morawetz in his work on Private Corporations. We quote from that work a portion of section 340: "It has sometimes been said that, if the seal of a corporation appears to be affixed to an instrument, the presumption is that it was rightly affixed—that the seal is itself *prima facie* evidence that it was affixed by the proper authority. The meaning of these statements is not perfectly clear. The seal ⁴⁹⁸ of a corporation certainly has no mysterious virtue not possessed by other seals; and a contract under seal executed by the agents of a corporation is subject to the same rules of evidence and of law as a similar contract executed by the agents of an individual. In order to prove the execution of a contract purporting to have been executed under the corporate seal, two facts must be shown. 1. It must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question, or contracts of that general description; and, 2. It must be shown that the signatures are genuine, or, in other, that these agents did actually execute that particular contract. The mere circumstance that a seal was affixed to the contract would evidently not tend to establish either one of these facts."

Here there was sufficient evidence that Wilder executed the contract in the name of the corporation and affixed thereto the corporate seal. There was no evidence whatever that he had any authority, express or implied, to execute this contract, or contracts of this nature, or any contract whatsoever for the defendant corporation. We think, therefore, that the instrument was improperly admitted.

Exceptions sustained.

CORPORATIONS—POWERS OF A DIRECTOR.—Directors of a corporation, as such, can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only: *Buttrick v. Nashua etc. R. R. Co.*, 62 N. H. 413; 13 Am. St. Rep. 578, and note.

The Effect of the Corporate Seal as Evidence.

The effect of the affixing of a corporate seal to a writing was considered by us in the note to *B. S. Green Co. v. Blodgett*, 50 Am. St. Rep. 155, and the conclusion there announced is in direct opposition to that reached in the principal case. If the decision in that case is correct, the affixing of a corporate seal is a superfluity, for if, as there insisted, such seal can have effect only when shown to have been affixed by one having authority or by a proper official in the regular line of his duty, it has no effect whatsoever, because if the instrument is shown to have been executed on behalf of the corporation by one "having authority or by a proper official in the general line of his duty," there is no need to rely upon the seal. The principal case, however, is in harmony with the rule stated by Mr. Morawetz in his work upon *Private Corporations*, usually a very reliable authority, and one from which we should dissent with great diffidence if we were not supported by the almost unanimous concurrence of the courts which have expressed opinions upon this subject. In truth, we know of no decision, other than that in the principal case, agreeing with the rule stated by Mr. Morawetz in sections 340 and 616 of his treatise. The only authority cited by him in support of section 340 is section 616, and in support of section 616, section 340. He says in the latter section: "It has sometimes been said that if the seal of a corporation appears to be affixed to an instrument, the presumption is that it was rightfully affixed—that the seal itself is *prima facie* evidence that it was affixed by the proper authority. The meaning of this statement is not perfectly clear. The seal of the corporation certainly has no mysterious virtue not possessed by other seals; and a contract, under seal, executed by the agents of a corporation, is subject to the same rules of evidence and of law as similar contracts executed by the agents of individuals." Now that this opinion has been confirmed by the decision in the principal case, it may be best to re-examine the subject for the purpose of discovering whether there is any doubt respecting the meaning of the decisions referred to, and whether they do not clearly show that the seal of a corporation affixed to a writing, purporting to be executed by it, differs from a seal upon a contract purporting to be executed by an individual by his agent, in that in the former case the authority of the agent is presumed, and in the latter it must be proved.

In the case of *Koehler v. Black River Falls etc. Co.*, 2 Black, 715, 717, where the execution of a mortgage in behalf of a corporation was in issue, the supreme court of the United States said: "This mortgage had the corporate seal attached, and the presumption was

that it was there rightfully, and the court properly admitted it to be read in evidence, but the presumption thus raised was not conclusive, and parol evidence was admissible to overthrow it." A conveyance purporting to be executed in behalf of a corporation by its president and secretary, and having impressed upon it what appeared to be the corporate seal, was objected to on the ground that its execution did not appear to have been authorized by an order of its board of trustees. The judge overruling this objection said: "But I find that the seal upon this deed is that of the corporation at that date. This being so, and the signatures of the proper officers appearing signed thereon, the presumption is that those officers did not exceed their authority in this respect, and the seal itself is *prima facie* evidence of their authority": *Mickey v. Stratton*, 5 Saw. 478; *Southern etc. Assn. v. Bustamenti*, 52 Cal. 192. A deed was offered in evidence signed by trustees of a corporation and having affixed to it the corporate seal, but it was insisted that no authority on the part of such trustees to execute it appeared, and therefore that it could not operate as a conveyance of the title of the corporation. The court held that: "It lies with the party objecting to the due execution of the deed to show that the corporate seal was affixed to it surreptitiously or improperly, and that all the preliminary steps to authorize the official having the legal custody of the seal to affix it to the deed had not been complied with": *Miners' etc. Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300. This decision has been repeatedly followed and affirmed in the same state: *Underhill v. Santa Barbara*, 93 Cal. 300; *Andres v. Fry*, 113 Cal. 124; *Blood v. La Serena etc. Co.*, 113 Cal. 221. Speaking of a bond offered in evidence as that of a corporation, Lord Denman said: "The plaintiff proved that the common seal of the corporation was affixed to the bond by the officer who had the legal custody of it, and so threw upon the defendants the burden of clearly proving that it was not set by their authority": *Hill v. Manchester etc. Co.*, 5 Barn. & Adol. 874. An appeal bond was signed in the name of a railway corporation by its general attorney with the seal of the corporation attached. The respondents thereupon moved to dismiss the appeal, upon the ground that it did not appear that the bond had the corporate name attached by any person having authority. The motion was denied, the court saying: "The bond appears to have been executed under the seal of the corporation. This raises a presumption that the person using the seal had authority to do so": *Indianapolis etc. Co. v. Morganstern*, 103 Ill. 149. A deed was offered in evidence purporting to convey the property of a college corporation, signed by its president and secretary, but was excluded by the trial court, upon the objection of the defendant that no authority for its execution had been shown. The action of the trial court was declared to be erroneous, because the authority of the officers to execute the deed was established by the admission that it was sealed with the corporate seal: *Morris v. Keil*, 20 Minn. (531) 476. An assignment for the benefit of creditors purported to be signed by a corporation by

I. W., its agent, and had the corporate seal affixed. The court said: "Where the signature of the agent who acts on behalf of the corporation is proved, the seal is presumed to be the seal of the corporation until the contrary is proved. So, where the instrument is formally executed by an agent, his authority to act is presumed. Where the treasurer of a corporation made an assignment of a mortgage under the seal of the corporation, it is intimated by the court that, in the absence of any evidence to the contrary, it will be presumed that the assignment was executed and the seal of the corporation attached by proper authority. We think, therefore, that the deed was executed in proper form, and that, in the absence of any evidence to the contrary, the authority of the agent to execute it must be presumed": *Flint v. Clinton Company*, 12 N. H. 433. Where it appeared that a mortgage purporting to be executed on behalf of a manufacturing and banking company by its president and secretary was sealed with the corporate seal, the court said: "This is *prima facie* a due and lawful execution of the instrument. The appearance of the common seal of a corporation to an instrument is evidence that it was affixed by the proper authority": *Leggett v. New Jersey etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728. A corporation, by its answer in chancery in a suit to foreclose mortgages, denied the authority of its president to affix the corporate seal to such mortgages, and insisted that under such denial it was necessary for the complainant to show such authority. The court held that the mortgages, as thus executed, were adequate evidence in contradiction of the denial of the answer, saying: "In this case, therefore, the bonds and mortgages under the corporate seal of the company, which was affixed to them by the president, who had the legal custody of such seal, were *prima facie* evidence that the whole amount secured thereby was justly due, and it lay with the defendants to establish by legal proof that there was fraud in obtaining them, or that the seal was improperly placed upon the bonds and mortgages, and without authority": *Lovett v. Steam Saw Mill Assn.*, 6 Paige, 54. A deed of a banking corporation, when offered in evidence, was objected to, upon the ground that the name of the corporation was not signed to the deed, but the name of its cashier only, but such deed had impressed thereon the corporate seal. The court held, in the first place, that the form of the execution of the deed was sufficient, and that it was "equally well settled that the seal of a corporation affixed to a deed is *prima facie* evidence that it was so affixed by the authority of the corporation, and that it lies with the party objecting to the due execution of the deed to show that it was affixed improperly or without authority": *Sheehan v. Davis*, 17 Ohio St. 571. An agreement was offered in evidence purporting to be executed by a corporation, and testimony was received showing that the seal impressed thereon was the seal of the corporation, and that it was executed by the persons whose names were signed to it, but the subscribing witness could not testify to seeing the corporate seal affixed. An ob-

jection was thereupon interposed to the admission of the agreement in evidence, and was sustained by the court. It also appeared that the instrument was not signed by the number of managers required by the act of incorporation to constitute a quorum. In reversing the judgment of the trial court, the appellate court said: "It is clear, however, the court could not, with or without evidence, assume the fact that the contract was made by persons destitute of authority from the corporation, which may, if it be not expressly restrained by its charter, contract through the agency of a selected committee of its members. Here the affixing of the seal, which is merely a ministerial act, was the matter in question, and that surely might be done by a less number than was at first competent to enter into the contract, provided it were by the direction of the legal quorum. The seal itself was prima facie evidence that the contract had been duly entered into by the corporation, and we know not that the office of affixing it is confined by the charter to any particular officer or member. If it were, in fact, affixed by persons having no authority, that was a matter for subsequent consideration by the jury, and not proper for discussion before the court at the period when the bill of exceptions was sealed": *Berks Turnpike Road v. Myers*, 6 Serg. & R. 12; 9 Am. Dec. 402. In an action of assumpsit upon a contract purporting to be executed on behalf of a municipal corporation by a committee of its board of aldermen, it was objected that there were three members of the committee, only two of whom had acted, and that, as there were several agents, all must join to bind the principal. The court, in answering this objection, said: "Without proceeding to examine whether the principle is applicable to a committee of a legislative body, such as the mayor and aldermen of a town, it is sufficient to observe that a seal of a corporation to an instrument constitutes prima facie evidence that it was planted there by the proper authority, and that the instrument is the act of the corporation. In the absence of proof to the contrary, this contract must be taken to be the act of the corporation without reference to the question of the authority of the committee": *Levering v. Mayor*, 7 Humph. 553. In an action of ejectment, a conveyance from the trustees of the University of North Carolina was received in evidence, but the defendant asked that the jury be instructed that the plaintiff could not recover under such deed, unless it was proved that, by the laws of North Carolina, the governor was ex officio president of the board of trustees, and, as such, authorized of his own mere motion to affix the seal of the corporation. This request for an instruction was refused, and the jury returned a verdict for the plaintiff. In sustaining this decision, the supreme court said: "The proof that the president of the board was the hand that affixed the seal is well, yet the deed would have been good without such proof. The presumption that such seal was affixed by the proper authority arises upon the existence of the fact that it is to the deed": *Darnell v. Dickens' Lessee*, 4 Yerg. 7. Many other cases might be cited in support of the gen-

eral proposition that, when a writing appears to be executed by officers of a corporation and has impressed upon it the corporate seal, and probably when it does not appear what officers or persons assumed to act for the corporation, they will be presumed to have acted within the limits of authority conferred upon them, and hence that no other evidence need be offered in the first instance for the purpose of proving that the writing in question is the act of the corporation: *Solomon's Lodge v. Montmollin*, 58 Ga. 547; *Reed v. Bradley*, 17 Ill. 321; *Wood v. Whelen*, 93 Ill. 153; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401; *Sherman etc. Co. v. Swigart*, 43 Kan. 292; 19 Am. St. Rep. 137; *Burrill v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395; *St. Louis Public Schools v. Risley*, 28 Mo. 415; 75 Am. Dec. 131; *Kansas v. Hannibal etc. Ry. Co.*, 77 Mo. 185; *Evans v. Lee*, 11 Nev. 194; *Hoyt v. Thompson*, 5 N. Y. 335; *Parkinson v. Parker*, 85 Pa. St. 313; *Hopkins v. Gallatin etc. Co.*, 4 Humph. 403. It is true that in many of these cases the writing was signed on behalf of a corporation by its president and secretary, and that the secretary was presumptively the officer having the custody of the corporate seal, or where the writing was not signed by these officers, it was shown that the corporate seal was affixed by some person having the custody of it. We do not think, however, that any evidence upon the subject is necessary beyond such as may be required to establish that the seal was, in fact, at the date of the execution of the instrument the seal of the corporation. In truth, we have been able to discover no decision, other than that in the principal case, in which it has been held necessary to make any proof of the due execution of an instrument to which the corporate seal was attached. Hence we feel justified in reasserting what we said in the note in 50 Am. St. Rep. 155, to wit: "The reason why it is desirable to attest all contracts and other acts of a corporation with its seal, when this is possible, is that the presence of such seal establishes *prima facie* that the instrument to which it is affixed is the act of the corporation, and dispenses with the necessity of any proof on the part of the person claiming under it that it was executed by the proper officers, that they had authority to so execute it, and that all proceedings of whatever character, necessary to such authority had been duly taken, unless the corporation should first, by competent evidence on its part, have rebutted the presumption arising from the presence of the common seal." It is true that in some of the decisions the rule is accompanied with a statement to the effect that it is applicable when it appears that the instrument was executed by the proper officers, but, as we understand the rule, it is not necessary that an instrument intended to bind a corporation appear to have been executed by any officer. It is sufficient that it have impressed upon it the corporate seal, and the officer who impresses such seal or otherwise executes the instrument in behalf of the corporation need not sign his name thereto as an agent or officer of the corporation, or otherwise: *Jackson v. Walsh*, 3 Johns. 226; *Clark v. Farmers' etc.*

Co., 15 Wend. 256; Doe v. Hogg, 1 Bos. & P. N. R. 306; Angell and Ames on Corporations, sec. 225; Sugden on Vendors, 8th Am. ed., 730; and where an officer is specially authorized to act by the vote of the board of trustees, one officer may as well be selected as another, or an agent may be chosen to act for the corporation who is not an officer thereof at all.

In stating the reasons which have led to the adoption of the prevailing rule upon this subject, the court, in *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300, said: "The rule must be as stated on principle, independent of authority. Any other would be subversive of the public interests; for no man could deal in safety with corporations, and all business transactions with these institutions would almost necessarily cease, and the end of their creation fail of accomplishment. Confidence is a necessary element in all business transactions. If strangers cannot rely, at least *prima facie*, upon deeds of private corporations apparently regularly executed in pursuance of the powers conferred by their charters, under the corporate seal, and attested by the signatures of the officers, upon whom the control of their affairs is devolved by law, upon what may they rely? This is the most direct, formal, and solemn assurance that can possibly be given by those authorized to give assurances. It is the legally appointed mode in which the corporation speaks to the external world, and manifests its corporate will. Parties dealing with private corporations have no other reliable means of ascertaining the circumstances under which the act is done. The books, records, and papers of such corporations are private property, and not open to inspection by strangers. Many, if not in practice most, of their corporate acts are not made matters of record. Besides, it is as easy to make a false statement in some other mode—by a false record—as by a false deed. Whatever is done must be done through agents, and if their most formal and solemn assurances under the corporate seal are not reliable, then none of their acts can be depended on, and those dealing with corporations are absolutely without the means of self-protection. The rule established rests upon a foundation of solid sense. If this is not the rule, then, surely, there is too much truth in the saying that corporations are intangible, impersonal, irresponsible, soulless, artificial beings, endowed with a capacity to accumulate and enjoy property, and exercise most of the functions and privileges pertaining to natural, material persons, but under no moral restraints, and subject to few of the implications and responsibilities to which natural persons are liable, and the less men have to do with them the better it will be for them."

DEXTER v. CURTIS.

[91 MAINE, 505.]

MORTGAGE OF CHATTELS—AFTER-ACQUIRED PROPERTY, WHEN SUBJECT TO.—If a mortgage contains stipulations authorizing the mortgagor to sell any portion of the mortgaged property, and requiring him to replace that sold by purchasing with the proceeds other articles of a like kind, which are to be subject to the lien of the mortgage, then the mortgage has the effect of passing to the mortgagee the legal title to the property so acquired.

A MORTGAGE OF CHATTELS AUTHORIZING THE MORTGAGOR to sell portions of the property mortgaged, and with the proceeds to purchase other goods of a like kind, which shall be subject to the mortgage, does not authorize him to sell to other creditors in payment of his past debts, and, if he does turn over the mortgaged property or any part thereof to them in such payment, they are liable to the mortgagee for the conversion of the property so taken by them.

Henry W. Oakes, for the plaintiff.

Tascus Atwood, for the defendants.

506 WISWELL, J. Action of trover for the conversion of a portion of a stock of goods. The case comes to the law court upon report.

For the purpose of proving title in himself to the articles alleged to have been converted, the plaintiff introduced in evidence a chattel mortgage given to him by one Edwin F. Goss, which contains the following description of the property mortgaged: "All my stock in trade, consisting principally of confectionery, fruit, and cigars, and all my store furniture, fixtures, and appliances, excepting my soda fountain and appliances, and including all machinery and appliances for making ice cream, now contained and used in the store and basement occupied by me, situated in said Auburn on the southerly side of Court street and known as No. 50 on said street."

507 The mortgage also contained the following provision: "It is mutually agreed and understood by the parties to this mortgage that the said Edwin F. Goss shall be allowed to barter, sell, and exchange the above named stock and with the proceeds purchase other goods of a like kind, which, together with all additions to said stock, shall be equally subject to the lien of this mortgage."

It has been frequently decided in this state that a chattel mortgage does not ordinarily pass the legal title to after-acquired property without some new act sufficient for the purpose, like a delivery to the mortgagee and retention of the same

by him, or a confirmatory writing properly recorded: *Sawyer v. Long*, 86 Me. 541, and cases there cited. But the rule is subject to this exception, that if the mortgage contains a stipulation authorizing the mortgagor to sell any portion of the mortgaged property, and requiring him to replace that sold by purchasing with the proceeds other articles of a like kind, which are to be subject to the lien of the mortgage, then the mortgage will have that effect, and will pass to the mortgagee the legal title to the property so acquired. *Abbott v. Goodwin*, 20 Me. 408; *Sawyer v. Long*, 86 Me. 541.

While the evidence in this case is not as definite and as exact as could be desired, we think that the testimony of Goss, the mortgagor, which is entirely uncontradicted upon this question, fairly shows that the goods claimed to have been converted by the defendant were either in the mortgagor's store as a part of his stock in trade when the mortgage was executed, or were subsequently purchased by him for the purpose of replenishing his stock and paid for with the proceeds of the goods sold.

Are the defendants liable for a conversion of these goods? They were creditors of Goss. They had both constructive and actual notice of the mortgage. They obtained these goods from Goss for the purpose of reducing his indebtedness to them, and credit was given him for the goods upon their account. The title to goods thus obtained did not pass to them. While the mortgagor had the right to sell or to exchange any portion of his stock, he did not have the right to sell these goods to his creditors in payment of past indebtedness. Any person who obtained these goods ⁵⁰⁰ of the mortgagor for this purpose did not acquire title to them as against the mortgagee. The refusal to deliver the goods thus obtained upon demand by the plaintiff was a conversion.

There is no merit in the claim that a portion of these goods was received by the defendants in exchange for other goods which they at the time, or as a part of the transaction, delivered to the mortgagor, because the case shows that the mortgagor paid in cash for all goods received during the period that the defendants were obtaining the articles sued for.

According to the testimony upon the part of the defense, the price agreed upon, and for which the mortgagor received credit, was one hundred and thirty-four dollars and forty-seven cents. The defendants also had of the mortgagor a quantity of cigars, the price of which was not settled by the parties to the transaction, but the value of which was estimated by one of the de-

fendants to be fifty-two dollars and sixty-five cents. For these two amounts, together with interest from the time of the demand and refusal, the plaintiff should have judgment.

Judgment accordingly.

CHATTEL MORTGAGE—WHEN COVERS AFTER-ACQUIRED TITLE.—If one agrees to sell another a stock of goods, but reserves title in himself until the purchase price is paid, and it is provided that all “substituted goods, as well as all others used in the business” shall be subject to the lien and operation of the agreement, the contract, as to property subsequently acquired, including stock purchased by the vendee, operates as a mortgage: *Hudson v. McKale*, 107 Mich. 22; 61 Am. St. Rep. 310, and note; *Francisco v. Ryan*, 54 Ohio St. 307; 56 Am. St. Rep. 711, and note. A mortgage similar to that in the principal case was held not to cover after-acquired property in *First Nat. Bank v. Lindenstruth*, 79 Md. 136; 47 Am. St. Rep. 366, and see note thereto.

WATSON v. PORTLAND & CAPE ELIZABETH RY. CO.

[91 MAINE, 584.]

NEGLIGENCE.—THE QUESTION OF NEGLIGENCE IS FOR THE JURY when the facts are in dispute, and also when they are indisputable, but intelligent and fair-minded men may reasonably differ as to the conclusions to be drawn therefrom. It is otherwise when the facts are not in dispute and are susceptible of but one conclusion.

STREET RAILWAYS—NEGLIGENCE—RIDING ON THE PLATFORM OF A STREET-CAR.—It is not true, as a proposition of law, that one riding on the platform of a street railway car, propelled by horses or electricity, is guilty of contributory negligence, precluding his recovery for injuries sustained by him by being thrown from such platform while rounding a curve.

STREET RAILWAYS.—A PASSENGER RIDING ON THE PLATFORM OF A STREET RAILWAY CAR takes upon himself the duty to look out for and to protect himself against the usual and obvious perils attendant on his position, such as, for instance, the danger of being thrown from the platform by the jolting or swinging of the car.

H. & W. J. Knowlton and L. M. Webb, for the plaintiff.

Clarence Hale, for the defendant.

589 **WISWELL, J.** The plaintiff, while riding upon the front platform of one of the defendant's electric street-cars, was thrown from the car by its sudden jolting, and, striking the ground with considerable violence, sustained more or less injury.

It is claimed that this was caused by the negligence of the motorman in allowing his car to come toward a switch with such speed that he was unable to see whether it was properly set or

not, ⁵⁹⁰ and, the switch being open, that the car was propelled so rapidly onto a siding as to cause violent jarring and jolting.

After the evidence upon both sides had been closed, the presiding justice directed a verdict for the defendant. To which direction exception is taken. It becomes necessary, therefore, to decide whether, upon all the evidence, regarding it in the most favorable aspect for the plaintiff that it is susceptible of, the jury would have been justified in returning a verdict for the plaintiff.

Upon the question of the alleged negligence of the defendant, it is only necessary to say that in our opinion there was sufficient evidence to submit this question to the jury. Was there also sufficient evidence upon the question of the plaintiff's own care to sustain the burden of proof resting upon him in that respect?

The question of negligence is ordinarily one for the jury. It is always so, not only when the facts are in dispute, but also when the facts are undisputed, but intelligent and fair-minded men may reasonably differ as to the conclusions and inferences to be drawn from such facts. Because, in passing upon this question, a jury must not only decide what was in fact done or left undone, but also as to what should have been done in the situation. But this is not true when the facts are not in dispute and when the undisputed facts are susceptible of but one conclusion. In such cases it is not only proper, but it is the duty of the court to take the case from the jury: *Romeo v. Boston etc. R. R.*, 87 Me. 540.

In this case the presiding justice, in directing a verdict for the defendant, gave certain reasons why, in his opinion, a verdict for the plaintiff would not be warranted and could not be sustained, saying, among other things, "that the riding upon the platform of a passenger-car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve." And again: "It is settled as a question of law that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence."

In our opinion, this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, electricity, ⁵⁹¹ or otherwise. Riding upon the platforms of such cars is too much encouraged by transportation companies, and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence per se, or is negligence in law. It depends upon too many other circumstan-

ces and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case.

That this is true with respect to horse street-cars is not questioned, and has been frequently decided: *Meesel v. Lynn etc. R. R. Co.*, 8 Allen, 234; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Fleck v. Union Ry. Co.*, 134 Mass. 480; *Germantown Passenger Ry. Co. v. Walling*, 97 Pa. St. 55; 39 Am. Rep. 796; *Vail v. Broadway R. R. Co.*, 147 N. Y. 377; *Nolan v. Brooklyn City etc. R. R. Co.*, 87 N. Y. 63; 41 Am. Rep. 345; *City Ry. Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798.

But it is claimed upon the part of the defense that while this is true in the case of a horse-car, as to electric-cars the rule laid down in this state and generally with respect to trains of cars upon steam railroads should apply: *Goodwin v. Boston etc. R. R.*, 84 Me. 203. We do not think so. An electric street-car is still a street-car, and in our opinion the conditions, especially with respect to riding upon platforms, are more similar to those of the horse street-car than those of a railroad train upon a steam railroad.

It is a notorious fact that street railroad companies, whose cars are propelled by electricity, constantly accept and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform, step or footboard. Neither carrier nor public have regarded the street-car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric street-car is thereby guilty of such contributory negligence as to prevent his recovery for injuries sustained through ⁵⁹² the fault of an employé of the transportation company. We hold rather that it is a circumstance to be submitted to and decided by the jury.

Such is the conclusion that many of the courts of this country have arrived at: *Elliott v. Newport Street Ry. Co.*, 18 R. I. 707; *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717; *Wilde v. Lynn etc. R. R. Co.*, 163 Mass. 533; *Reber v. Pittsburg etc. Traction Co.*, 179 Pa. St. 339; 57 Am. St. Rep. 599.

It is further urged by counsel for defendant that the verdict was properly ordered, even if the reasons given therefor by the presiding justice cannot be sustained; that if the court should hold that a person cannot be said, as a matter of law, to be guilty

of negligence from the mere fact that he was standing upon the platform of an electric street-car in motion, that this plaintiff was nevertheless negligent in not taking such precautions as the obvious and usual dangers of his position required; and that it is immaterial that the reasons given by the presiding justice in ordering a verdict were erroneous, if upon the facts the verdict was properly ordered.

There is no question about the correctness of these propositions of law. A passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position, such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car: *Elliott v. Newport etc. Ry. Co.*, 18 R. I. 707.

But the court is of the opinion that the evidence in this case does not sustain the defendant's contention; that is, in the opinion of the court, the evidence does not so clearly show contributory negligence upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury. The case comes within the general rule, that the question of negligence is ordinarily one for the jury, and not within the exception, that when the facts are undisputed and are susceptible of but one conclusion it is the duty of the court to take the case from the jury. The entry will therefore be, exceptions sustained.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY.—It is only when the deduction to be drawn is inevitable that the court is authorized to withdraw the question of negligence from the jury. The absence of conflict in the evidence is not controlling if differences of opinion as to the conclusions and inferences to be drawn therefrom may reasonably arise: *Fox v. Oakland etc. Ry.*, 118 Cal. 55; 62 Am. St. Rep. 216, and note; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; 58 Am. St. Rep. 709, and note; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 55 Am. St. Rep. 620, and note.

STREET RAILROADS—PASSENGER RIDING ON PLATFORM—CONTRIBUTORY NEGLIGENCE.—The fact that a passenger stands or rides on the platform or steps of a crowded car, on which there are no vacant seats, is not such contributory negligence per se as bars a recovery for injuries received through the negligence of the railway company or its employes: *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note. This is true although the passenger could have found a seat inside the car: *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72; *Muldoon v. Seattle etc. Ry. Co.*, 7 Wash. 528; 38 Am. St. Rep. 901, and note; *Thirteenth etc. Ry. Co. v. Boudrou*, 92 Pa. St. 475; 37 Am. Rep. 707, and extended note.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

SMITH *v.* McENANY.

[170 MASSACHUSETTS, 26.]

LANDLORD AND TENANT.—THE EVICTION OF A TENANT by a landlord from any part of the leased premises suspends the rent under the lease. Where, therefore, a landlord constructs a wall which encroaches upon part of the premises, he cannot recover rent from his tenant remaining in possession of the balance, whether such balance is materially changed in its character or beneficial enjoyment or not.

LANDLORD AND TENANT.—RENT CANNOT BE APPORTIONED.—If a landlord evicts his tenant from any appreciable portion of the leased premises, the tenant is exonerated from all liability for rent where such eviction continues, though he remains in possession of the greater and more valuable part of such premises.

AN EVICTION FROM PART OF THE LEASED PREMISES does not necessarily terminate the lease or the obligations of the tenant under it, but it relieves him, during its continuance, from the obligation to pay rent.

Action to recover rent alleged to be due under a written lease, and also to recover for a breach of covenant to repair. The defendant pleaded: 1. A general denial; and 2. An eviction. The jury found in the defendant's favor, and the plaintiff appealed.

J. K. Berry, for the plaintiff.

H. M. Rogers, for the defendant.

²⁶ **HOLMES, J.** This is an action upon a lease for rent, and for breach of a covenant to repair. There is also a count on an account annexed, for use and occupation, etc., but nothing turns on it. The defense is an eviction. The land is a lot in the city of Boston, the part concerned being covered by a shed which was used by the defendant to store wagons. The eviction relied on was the building of a permanent brick wall for a building on adjoining land belonging to the plaintiff's husband, which encroached nine inches by the plaintiff's admission, or, as his witness testified from measurements, thirteen and a half inches, or,

as the defendant said, two feet, for thirty-four feet along the back of the shed. The wall was built with the plaintiff's assent, and with knowledge that it encroached on the demised premises. The judge ruled that the defendant had a right to treat this as an eviction determining the lease. The plaintiff asked to have the ruling so qualified as to make the question depend upon whether the wall made the premises "uninhabitable for the purpose for which they were hired, materially changing the ²⁷ character and beneficial enjoyment thereof." This was refused, and the plaintiff excepted. The bill of exceptions is unnecessarily complicated by the insertion of evidence of waiver and other matters; but the only question before us is the one stated, and we have stated all the facts which are necessary for its decision.

The refusal was right. It is settled in this state, in accordance with the law of England, that a wrongful eviction of the tenant by the landlord from a part of the premises suspends the rent under the lease. The main reason which is given for the decisions is, that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned: *Shumway v. Collins*, 6 Gray, 227, 232; *Leishman v. White*, 1 Allen, 489; *Royce v. Guggenheim*, 106 Mass. 201, 202; 8 Am. Rep. 322; *Smith v. Raleigh*, 3 Camp. 513; *Watson v. Waud*, 8 Ex. 335, 339. It also is said that the landlord shall not apportion his own wrong, following an expression in some of the older English books: *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Colburn v. Morrill*, 117 Mass. 262; 19 Am. Rep. 415; *Mirick v. Hoppin*, 118 Mass. 582, 587. But this does not so much explain the rule as suggest the limitation that there may be an apportionment when the eviction is by title paramount, or when the lessor's entry is rightful: *Fillebrown v. Hoar*, 124 Mass. 580, 583; *Neale v. Mackenzie*, 1 Mees. & W. 747, 758; *Christopher v. Austin*, 11 N. Y. 216, 218; *Hodgkins v. Robson*, 1 Vent. 276. *Hodgkins v. Thornborough*, Pol. 141; 3 Keb. 557; *Coke on Littleton*, 148 b; *Gilbert on Rents*, 151 et seq. It leaves open the question why the landlord may not show that his wrong extended only to a part of the premises. No doubt the question equally may be asked why the lease is construed to exclude apportionment, and it may be that this is partly due to the traditional doctrine that the rent issues out of the land, and that the whole rent is charged on every part of the land. *Gilbert on Rents*, 178, 179, gives this as one ground why the lessor shall not discharge any part from the burden and continue to charge the

rest, coupled with considerations partly of a feudal nature: See, also, Walker's case, 3 Coke, 22 a, 22 b; Hodgkins v. Thornborough, Pol. 141, 143; Neale v. Mackenzie, 1 Mees. & W. 747, 763. But the same view naturally would be taken if the question arose now for the first ²⁸ time. The land is hired as one whole. If by his own fault the landlord withdraws a part of it, he cannot recover either on the lease or outside of it for the occupation of the residue: Leishman v. White, 1 Allen, 489. See Fuller v. Ruby, 10 Gray, 285, 289; Keener on Quasi Contracts, 215.

It follows from the nature of the reason for the decisions which we have stated that when the tenant proves a wrongful forfeiture by the landlord from an appreciable part of the premises, no inquiry is open as to the greater or less importance of the parcel from which the tenant is forfeited. Outside the rule de minimis, the degree of interference with the use and enjoyment of the premises is important only in the case of acts not physically excluding the tenant, but alleged to have an equally serious practical effect, just as the intent is important only in the case of acts not necessarily amounting to an entry and forfeiture of the tenant: Skally v. Shute, 132 Mass. 367. The inquiry is for the purpose of settling whether the landlord's acts had the alleged effect; that is, whether the tenant is forfeited from any portion of the land. If that is admitted, the rent is suspended, because, by the terms of the instrument as construed, the tenant has made it an absolute condition that he should have the whole of the demised premises, at least as against willful interference on the landlord's part. A case somewhat like the present is Upton v. Townsend, 17 Com. B. 30, 74. See, also, Sherman v. Williams, 113 Mass. 481, 485; 18 Am. Rep. 522.

We must repeat that we do not understand any question except the one which we have dealt with to be before us. An eviction like the present does not necessarily end the lease: Leishman v. White, 1 Allen, 489, 490; or other obligations of the tenant under it, such as the covenant to repair: Carrel v. Read, Cro. Eliz. 374; Snelling v. Stagg, Bull. N. P. 165; Morrison v. Chadwick, 7 Com. B. 266; Newton v. Allin, 1 Q. B. 518.

Exceptions overruled.

LANDLORD AND TENANT—EVICTION—EFFECT OF.—In order to constitute an eviction it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character which amount to a clear indication of an intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises consummate to an eviction; Keating v. Springer, 146 Ill., 481; 37 Am. St. Rep. 175, and note; Sully v. Schmitt, 147 N. Y. 248; 49 Am. St. Rep. 659, and note. Eviction by the landlord re-

Heves the tenant from the payment of rent accruing after his possession ceases, but rent already accrued and overdue is not forfeited thereby: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248, and note. It is now well settled that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended; not only the proportion of the rent due upon the part from which the tenant is evicted, but the entire rent of the premises: See monographic note to *Minneapolis etc. Co. v. Williamson*, 38 Am. St. Rep. 485, 491.

COURTEMANCHE v. BLACKSTONE VALLEY ST. RY. CO.

[170 MASSACHUSETTS, 50.]

MECHANIC'S LIEN.—PERSONS WHO HAVE SOLD LAND AND RESERVED THE TITLE AS SECURITY for the purchase price are not, from the fact that they know of the purpose of the purchaser to erect a building thereon, and that he is proceeding to accomplish such purpose, deemed to have consented to such building, so as to make their title subject to a mechanic's lien for work done or material furnished in its construction.

MECHANIC'S LIEN.—AN INTEREST UNDER A PAROL CONTRACT TO PURCHASE LAND is not enough to make one an owner who can create a lien.

MECHANIC'S LIEN.—THE ACT OR CONSENT OF THE PURCHASER OF REAL PROPERTY may relate back so as to subject it to a contract made and partially performed before he acquires title. Hence if he, after acquiring title to property upon which a building is in process of construction, consents to the subsequent completion of the contract, the effect of the consent is to include work previously done and to subject the property to a lien for work done before, as well as after, the consent thus given.

Suit to enforce a mechanic's lien. The defendant, a street railway company, employed the Worcester Engineering Company to build and equip its railway, and the petitioner under contract with the latter company furnished labor on the car barn. At the time when work on this barn was commenced, the land on which it stood belonged to the heirs of Bridget Mulcahy, who had orally contracted with the engineering company to sell the land to the defendant. Conveyances were executed in December, 1895, but were retained by the grantors until June of the following year, at which latter date the land was paid for. The grantors in this conveyance knew in November of 1895 of the survey for the erection of the barn, and, as they lived near it, saw the work thereon as it progressed. The work was not completed when the defendant acquired title, and it allowed such completion afterward. The trial court entered judgment in favor of the plaintiff, from which the defendant appealed.

W. S. B. Hopkins and F. B. Smith, for the respondent.

W. A. Gile, for the petitioner.

⁵¹ KNOWLTON, J. This case is submitted on an agreed statement of facts, and no inferences can be drawn in favor of either party: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536; *Mayhew v. Durfee*, 138 Mass. 584. The burden is on the petitioner, and unless the facts agreed are all that the law requires to establish his case, he cannot recover.

Until the building was nearly completed, the heirs of Bridget ⁵² Mulcahy were the owners of the land on which it was erected. They had orally agreed with the Worcester Engineering Company to sell this land to the respondent, but they had nothing to do with the contract for the erection of the building. They gave the respondent no title, but, having prepared deeds, they held them as security for the purchase money until the barn was almost completed. It does not appear that they authorized any work to be done on the land in such a way as to create a charge upon their interest in it, or consented to the erection of the building otherwise than upon the sole credit of the Worcester Engineering Company, or of the respondent as the owner of it. All that appears is, that they knew of the purpose to erect the building, and of the erection of it as the work went on. In this particular the case seems to be covered by the decisions in *Hayes v. Fessenden*, 106 Mass. 228, *Perkins v. Davis*, 120 Mass. 408, and *Saunders v. Bennett*, 160 Mass. 48, 39 Am. St. Rep. 456. We are of opinion that not enough is stated to show consent of the heirs of Bridget Mulcahy, as matter of law, within the meaning of the Public Statutes, chapter 191, section 1, and thus to bring the case within the decisions in which consent is held to be implied from the nature of the contract: See *Hilton v. Merrill*, 106 Mass. 528; *Davis v. Humphrey*, 112 Mass. 309; *Smith v. Norris*, 120 Mass. 58; *Carew v. Stubbs*, 155 Mass. 549; *McCue v. Whitwell*, 156 Mass. 205; *Borden v. Mercer*, 163 Mass. 7. Whether such consent could be inferred from the facts stated, if we were at liberty to draw inferences of fact, need not be determined.

As the petitioner cannot maintain his lien on the ground of the consent of these heirs, the question arises whether he can have a lien for anything, and if so for how much, on the ground that the labor was performed or furnished by consent of the respondent owner. It is held in the cases first above cited that an interest under a parol agreement to purchase land is not enough to make one an owner who can create a lien. It therefore follows that no lien was created prior to the delivery of the deed. But on the delivery of the deed the respondent became the owner, and a lien would exist for work done afterward by

its consent. A small part of the work was done afterward. We think the facts presented should be interpreted as a statement that the work done after the delivery of the deed was done ⁵³ by the respondent's consent. We also think that, under the facts stated, this consent applied to the doing of the work as a part of what was called for under an entire contract between the petitioner and the Worcester Engineering Company. In *Davis v. Humphrey*, 112 Mass. 309, 315, in reference to similar facts, this language is used: "There is no question that Goodwin knew that Davis was building for Humphrey under some agreement with him; whether he knew the precise terms of the agreement is not important. Under these circumstances, his consent that Davis should build must be taken to be a consent that he should build for Humphrey as agreed upon; or in other words, to do all which his contract with Humphrey required. Such consent covers the work performed under such contract, and must be held to include that which had been done when the consent was given, as well as that which was afterward done in completion of the contract." A somewhat similar decision was made in *Corbett v. Greenlaw*, 117 Mass. 167. We are of opinion that under the facts of the present case, inasmuch as the respondent was the sole owner of the land by a record title when the last part of the petitioner's work was done, and no other party was interested in it, the respondent's consent to the continuance of the petitioner in the performance of his work under an entire contract should be held to be a consent to the whole work included in the contract, so as to have the same effect under the statute as if the owner's consent had been given in advance. We do not intimate that its consent would be so construed as against the previously existing rights of mortgagees or others. In *Saunders v. Bennett*, 160 Mass. 48, 39 Am. St. Rep. 456, the report under which the case was argued did not show whether the work was done under an entire contract or not, and the question whether the owner's consent to the work done after he received the deed applied to that which was done before was not presented by counsel nor considered by the court.

Judgment affirmed.

MECHANIC'S LIEN—ATTACHES TO WHAT INTEREST—VENDEE UNDER CONTRACT TO PURCHASE.—A mechanic's lien will attach to an equitable interest in land held under a contract to purchase: *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881, and note; note to *Jarvis v. State Bank*, 55 Am. St. Rep. 137. But subcontractors and others who have performed labor and furnished materials under a contract with the vendee must, in the ab-

sence of an express stipulation to the contrary, look to him and his interest in the property alone for payment. They cannot charge the vendor as owner, even though the agreement of sale is in parol and void under the statute of frauds. No lien can be created upon the interest of any person as owner of the land, except such person has, either himself, or by his agent, entered into a contract for doing the work, either express or implied: See monographic note to *Loonie v. Hogan*, 61 Am. Dec. 689, 698. See, also, *Paulsen v. Manske*, 126 Ill. 72; 9 Am. St. Rep. 532; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272.

MECHANIC'S LIEN—WHEN ATTACHES TO AFTER-ACQUIRED INTEREST.—A mechanic's lien on an equitable estate attaches to an after-acquired legal title the moment it vests in the same person: *Lyon v. McGuffey*, 4 Pa. St. 126; 45 Am. Dec. 675, and note; *Evans v. Young*, 10 Colo. 316; 3 Am. St. Rep. 583, and note; *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881.

CROCKER v. COTTING.

[170 MASSACHUSETTS, 68.]

PARTITION IS A MATTER OF RIGHT, and hence may be compelled though the land sought to be partitioned is subject to a right of way which cannot be destroyed by the partition. The purchase of the land in common while subject to the easement of a passageway belonging to the purchasers does not raise an implication that the purchasers agreed to hold it in common, nor does it render partition inequitable.

Suit for partition which was dismissed by the probate court. On appeal from that court, its judgment was reversed by Judge Barker in the supreme court, and thereafter an appeal was taken to the full court.

G. Putnam and J. L. Putnam, for the trustees under the will of Samuel K. Williams.

Z. S. Arnold, for the trustees under the will of George S. Winslow.

S. Lincoln and H. M. Davis, for the petitioners.

⁶⁸ **HOLMES, J.** This is a petition for partition of a strip of land subject to a passageway, which already has been before the court: *Crocker v. Cotting*, 166 Mass. 183. In the former case, ⁶⁹ it was decided that the land under the way was not parcel of the adjoining estates. If it was not, then there was no question that it passed by two conveyances to the predecessors in title of the present parties, as tenants in common, or that the present parties are tenants in common still. This proceeding was begun in the probate court after the above decision: Pub. Stats., c. 178, secs. 1, 45. The case is here on appeal from the decree of a single justice of this court, reversing the decree of the probate court and granting partition. The petition is

resisted only on the grounds that the statute first cited does not apply to land subject to a right of way, and more especially that the implications of the purchase in common of the land subject to the easement already belonging to the purchasers are that the land should remain in common, and that it would be inequitable to divide it against that implied understanding.

To deal with the last argument first, we discover no such understanding as is supposed. Why the purchasers bought the land under the passageway is pure matter of conjecture. Their right of way was secure. Very possibly their thoughts went no further than to get rid of outside ownership. Probably they did not contemplate partition, because probably they never thought about it, one way or the other. The fact that they would have provided against it if they had thought about it, if established, would not exclude the right to partition as a necessary consequence. But we have no warrant for saying that they would have provided against it. It is equally possible, on the facts before us, that they would have said, when we get rid of outsiders, if it ever becomes convenient to divide the land we will do it, keeping up our right of way. If, indeed, the tendency in common of the servient land by the owners of the dominant estates had extinguished their several easements by merger, a very different question would be presented from that with which we are dealing. But the easements remained. They would not be extinguished so long as any difference in the quality of the title to the dominant and servient estates made it in any degree for the interest of the dominant owners to keep them alive. "That unity of title in the dominant and servient estate should operate to extinguish an easement; the ownership of the two estates should be co-extensive": *Atlanta Mills v. Mason*, 120 ⁷⁰ Mass. 244, 251; *Bradley Fish Co. v. Dudley*, 37 Conn. 136, 144, 145; *The King v. Hermitage, Carth.* 239, 241; *Washburn on Easements*, 518. See *Littleton and Moyle in Year Book*, 35 Henry VI, 55, 56, pl. 1. It is true that the petitioners make no mention of the easements to which the land is subject, but there is no indication that they hoped by this proceeding to cut off the respondents' rights of way, and that the respondents shall continue to have those rights may be made a term of the partition, for greater caution.

The fact, if it be one, that at the time of the original purchase in common passageways often were left in common in partitions under the statute, or that ways often were acquired by such a purchase, is far from sufficient to establish a binding surrender of one of the incidents of ownership. Mere incon-

venience is equally insufficient. Partition is a matter of right: *Mitchell v. Starbuck*, 10 Mass. 5, 12; *Potter v. Wheeler*, 13 Mass. 504, 507; *Warner v. Baynes*, Amb. 589; *Parker v. Gerard*, Amb. 236; *Turner v. Morgan*, 8 Ves. 143, 145, note 1; *Mayfair Property Co. v. Johnston* [1894], 1 Ch. 508; *Hanson v. Willard*, 12 Me. 142, 146, 147; 28 Am. Dec. 162; *Wood v. Little*, 35 Me. 107; *Willard v. Willard*, 145 U. S. 116; *Freeman on Cotenancy and Partition*, 2d ed., sec. 433. But in the case at bar no inconvenience appears. On the contrary, the convenience of the petitioners will or may be met by partition, and that of the respondents not otherwise impaired than by depriving them of a right to prevent the petitioners doing what they want to do, a right which may have pecuniary value.

Then as to the scope of the statute: Pub. Stats., c. 178, sec.

1. The language is: "Persons holding lands as . . . tenants in common may be compelled to divide such lands either by writ of partition at the common law or in the manner provided in this chapter." This language applies to the present case as plainly as words can, unless for some reason it is narrowed from what it seems to mean on its face. There is no doubt that land is not withdrawn from partition by the fact that a part of it is subject to easement: *Weston v. Foster*, 7 Met. 297, 299. There is no greater obstacle in the fact that the whole of it is. Suppose that all the parties wanted a partition but could not quite agree on the proportions, and that, as in this case, it was or might be ⁷¹ a great advantage to their several estates to have the land divided, it would strike everyone as monstrous if under this statute the courts should decline to proceed, on the ground that they were not given power. But if the voluntary jurisdiction extends to this case, the right to proceed in invitum also does. The jurisdiction is not affected by a defendant's recalcitrance.

In England when partition was asked and decreed of a moor, the objection was urged that the moor was subject to rights of common. But Sir William Grant, the master of the rolls, answered: "The rights of common are no objection to the commission; as that right will not be in the least affected by the partition; which regards only the freehold and inheritance of the soil. A partition never affects the interest of third parties. It is immaterial, whether others have a right over that soil and freehold, which they have in common among them. Those rights will equally remain": *Agar v. Fairfax*, 17 Ves. 533, 544. The same thing is said concerning a right of way by Chief Justice Shaw, in *Weston v. Foster*, 7 Met. 297, 299, already re-

ferred to. These considerations appear to us to dispose of the case.

Decree affirmed.

PARTITION AS A MATTER OF RIGHT.—As a general rule, an adult tenant in common may demand partition as a matter of right: *Martin v. Martin*, 170 Ill. 639; 62 Am. St. Rep. 411, and note. It is not a matter of judicial discretion, and the only indispensable requisite to entitle the co-owner applying for partition to relief is that he shall show a clear legal title: *Ransom v. High*, 37 W. Va. 838; 38 Am. St. Rep. 67. However inconvenient and injurious it may be to make it, a tenant in common is entitled to partition: *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339; *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198, and note.

LONG v. RICHARDS.

[170 MASSACHUSETTS, 120.]

MORTGAGE—FRAUDULENT FORECLOSURE—ELECTION TO AVOID.—If the foreclosure of a mortgage is fraudulent, the mortgagor or a second mortgagee may elect to treat it as void, and a second mortgagee, in seeking to redeem, need not plead fraud in the foreclosure, but may proceed as if no foreclosure had been attempted; and if the defendant pleads it, the complainant may rely on his general denial in his replication.

MORTGAGE—FRAUD IN FORECLOSURE—EVIDENCE SUFFICIENT TO ESTABLISH.—The finding of fraud in foreclosing a mortgage is sustained by evidence showing that the principal debt was not due, that the default relied upon was in the payment of six months' interest, that the plaintiff made nine attempts to pay without being able to find the defendant's lawyer in his office, that the sale was advertised in the month when the interest fell due, and no notice was given to plaintiff, that the notice of sale stated the premises to be subject to a large mortgage, which in fact had been paid and released, and the sale took place on a deserted beach at 4 o'clock of a November afternoon, no bidder being present except an agent of the foreclosing mortgagee.

MORTGAGEE AFTER A FRAUDULENT FORECLOSURE, WHEN CHARGEABLE AS A MORTGAGEE IN POSSESSION.—If the holder of a first mortgage forecloses it by proceedings which the mortgagor has the right to avoid as fraudulent, but he does not do so, a second mortgagee may proceed against the first as a mortgagee in possession and compel him to account as such.

A MORTGAGEE IN POSSESSION IS NOT ENTITLED TO BE ALLOWED FOR PAYMENTS MADE BY HIM FOR INSURANCE on the premises, though he had a right to insure under the mortgage, if, at the time of insuring, he claimed to have foreclosed the mortgage and to be in possession by virtue of such foreclosure, and that the title of the mortgagor had terminated, and hence, in obtaining insurance, he proceeded on his own account, wholly outside of his relations to the mortgagor.

A MORTGAGEE IN POSSESSION IS LIABLE FOR SUCH RENTAL AS MIGHT HAVE BEEN EARNED by prudent management, where there has been bad faith on his part.

A MORTGAGEE IN POSSESSION IS LIABLE TO ACCOUNT for such rental as might have been earned by prudent management, though he supposed he had become the owner in fee of

the property by his foreclosure, if such foreclosure was fraudulent or so conducted that the parties sought to be affected by it have the right to elect to treat it as void.

LIS PENDENS.—A PURCHASER PENDENTE LITE CAN STAND NO BETTER than the original defendant and takes the property subject to all the incidents of the suit, including the possible amendment of the bill.

A MORTGAGEE IN POSSESSION CANNOT, BY ANY CONVEYANCE OF THE PREMISES PENDING A SUIT to redeem and for an accounting, relieve himself from liability to account for such rents as might have been earned by prudent management, though after the time of such transfer.

MORTGAGEE IN POSSESSION—LIABILITY OF TO A SECOND MORTGAGEE.—Upon a bill to redeem, a second mortgagee has the right to an accounting from a first mortgagee upon the same terms as the owner of the equity, whom he represents.

MORTGAGE, FORECLOSURE OF SECOND—POSSESSION SUFFICIENT TO SUSTAIN.—A first mortgagee cannot object that a foreclosure of the second mortgage is imperfect and ineffective because of the failure to take possession of the mortgaged premises, and to hold them peaceably for three years, if such failure was due to the fact that the first mortgagee was holding possession under a fraudulent foreclosure which the second mortgagee had the right to treat as void.

Suit commenced in April, 1898, by a second mortgagee against Albin M. Richards to redeem from a first mortgage. The defendant claimed to have foreclosed his mortgage, to have taken possession under his foreclosure, and to be entitled to retain such possession. After this attempted foreclosure the plaintiff proceeded to foreclose his second mortgage, and with respect to his foreclosure the master found: "I find that, as the entry of the plaintiff under his said mortgage was properly made, and the certificate thereof was made and recorded in accordance with the statutes, it was effectual and sufficient to accomplish the purpose for which it was intended, and gave full and authoritative notice to all persons of the fact, and the date of the mortgagee's peaceable entry, and the cause of such entry, and his purpose to foreclose, and an implied intention on his part to keep the possession he had thus lawfully acquired for the term of three years; that personal occupation of the said mortgaged estate by the plaintiff himself, or the actual appropriation of the rents and profits during the three years following said entry is not necessary; that the actual possession of the said mortgaged premises by the defendant Richards and his agents after said entry was, at best, nothing more than the possession of a prior mortgagee, and was consistent with the plaintiff's possession as second mortgagee taken as aforesaid, although said Richards then claimed title in fee to the said premises; and I find that the plaintiff's said mortgage has been legally

foreclosed." During the pendency of this suit, the plaintiff died, and his executors were allowed to come in and continue the prosecution, and the defendant conveyed the property to W. J. Hanrahan and he to C. S. Reynolds, both of whom were made parties to the suit. The trial court found that the plaintiff was entitled to redeem, and referred the taking of the account to a master who made a report, to which exceptions were taken, but the report was confirmed and a final decree in favor of the plaintiff, and the defendants appealed.

J. C. Gray, for Richards.

T. H. Buttimer, for the administrators of the estate of Charles S. Reynolds, and for his minor children and heirs at law.

A. Hemenway & D. C. Linscott, for the plaintiff.

¹²² HOLMES, J. This case was tried in the superior court, and is here on report. It was a bill in equity brought to redeem land from a mortgage. The defendant Richards pleaded a foreclosure, and there was a general replication. The first question of any importance raised at the hearing is, whether on these pleadings evidence was admissible that the foreclosure was fraudulent. As the replication was in the form required by rule 15, we assume this to mean a question whether the evidence was admissible without amending the bill. The defendant relies on the principle that the court will not go into charges of fraud unless they are specific, and no doubt the principle is correct where fraud is set up as a ground of relief. But if an amendment were necessary, undoubtedly it would be allowed, as the defendant did not suggest surprise or ask for delay or for a specification of the particulars of fraud relied on, but went on and offered his evidence of good faith, and manifestly is insisting on the objection solely in the hope of gaining by what under the circumstances is a technicality. But further, by the rule obtaining in this commonwealth, if the foreclosure was fraudulent, the plaintiff did not need to come into court for relief, but could avoid the effect of the fraudulent act by his own election in pais: *Bassett v. Brown*, 100 Mass. 355; *Billings v. Mann*, 156 Mass. 203, 204. This being so, it is a question which need not be decided whether he was not at liberty to manifest his election by filling a bill to redeem, ignoring the alleged foreclosure, and, if the defendant pleaded it, to rely upon his general denial in the replication. This bill seeks no relief against the foreclosure, but proceeds on the footing that it has been avoided *ab initio*.

¹²³ One other formal objection is made. It is argued that if the second mortgage, on which the original plaintiff founded his right to redeem, has been foreclosed, this bill cannot be prosecuted by his executrix, and that by alleging a foreclosure she has amended herself out of court. The short answer to this is to be found in the Public Statutes, chapter 181, section 40. In what follows, for the sake of simplicity, we shall speak as if Long still were the plaintiff, and as if Richards, the first mortgagee, were the sole defendant.

It is argued that, if the question of fraud is open, the evidence discloses none. The justice who heard and saw the witnesses found that the plaintiff had made out his case, so that the only question for us is whether the desiccated leaves of the report clearly show that he was wrong. The principal of the debt was not due, and the default for which the foreclosure was attempted was in payment of six months' interest, which, according to the plaintiff's testimony, his cestui que trust and agent, who had paid it on former occasions, made not less than nine attempts to pay without being able to find the defendant's lawyer in his office. The sale was advertised on the month when the interest fell due, and no notice was given of the fact to the plaintiff, although it is only fair to say that a reputable witness for the defendant testified that the plaintiff had expressed indifference on the matter, and although the defendant perhaps did not know of the interest of the cestui que trust. In the notice the premises were stated to be subject to large mortgages, which in fact had been paid off and released by deeds recorded in the registry. The place of the sale was on the premises at Nantasket Beach; the time, November 12, at 4 o'clock in the afternoon. That is to say, it was toward dusk on a deserted beach. There would seem to have been no public conveyance to the premises. No notice of the sale was put up there. Naturally, under these circumstances, an agent of the mortgagee was the only bidder, and, according to the plaintiff's evidence, he bid an inadequate price. Assuming without deciding that the grave mistake in the notice did not make the sale void, in the sense that it went for nothing unless affirmed by the parties interested (*Donohue v. Chase*, 130 Mass. 137), we cannot say that the facts recited did not warrant the finding of the judge that it was at least voidable at the choice of the mortgagor.

¹²⁴ Next, certain questions are raised by exceptions to the master's report, as to the principles on which the account shall

be taken. It is suggested that the defendant Richards, when he foreclosed his prior mortgage, acquired not only the title of the plaintiff as second mortgagee, but also that of the owner of the equity, since the second mortgage at that time at least was not foreclosed, and that, as the owner of the equity has not attempted to avoid the foreclosure sale, the defendant Richards has a right to attribute his possession to his ownership of the equity, and cannot be made to account on the footing of a mortgagee in possession, even if the second mortgagee has a right to reopen the foreclosure. But if the attempted foreclosure was a fraud on the rights of the plaintiff, as against him it is to be taken as ineffectual throughout. As against him the defendant cannot be allowed to say that he has gained advantages incident to owning the equity, when the transaction by which he gained it was a fraud on the plaintiff. This is not the case of foreclosure by decree, which is held valid as against the owner of the equity in some jurisdictions, although invalid as against a second mortgagee simply by reason of his not having been joined. On the contrary, the finding which establishes the right of the second mortgagee to avoid the foreclosure establishes also the right of the owner of the equity to avoid it, even if the sale was not void. If he did not choose actively to assert his right, but simply remained silent, it ought not to affect the plaintiff's position, for the plaintiff represents the equity as against the defendant: See *Ten Eyck v. Casad*, 15 Iowa, 524. At different points of this case, it appears that one of the contests between the parties is a struggle for the equity of redemption. The plaintiff's estate would have it by foreclosure of the second mortgage but for the defendant's foreclosure and subsequent forcible possession, the effect of which we have not yet considered. It seems to us reasonable to say that, inasmuch as, whatever we should have found had we heard the evidence, we must assume the foreclosure to have been a fraud on the plaintiff's rights, at least the defendant shall not have the benefit of the foreclosure for any purpose of determining his relations to the plaintiff.

The second exception to the master's report is that the master ¹²⁵ did not allow the defendant premiums on insurance obtained by him after his foreclosure sale. The ground on which the exception is taken is that by the terms of the mortgage the mortgagor was bound to keep the premises insured for the benefit of the mortgagee, and that on his failure to do so the mortgagee had a right to insure and charge the premiums to him:

Fowley v. Palmer, 5 Gray, 549; *Montague v. Boston etc. R. R. Co.*, 124 Mass. 242, 247. But the claim of the mortgagee is based on the default of the mortgagor, and it hardly is possible in this case to say that the mortgagor was in default for not insuring, when the mortgagee affirmed and insisted that the mortgage was at an end. Moreover, the master must have been right in finding that the mortgagee, when he obtained the insurance, neither purported nor intended to proceed under the mortgage and to obtain an agreement of indemnity which, if paid, would go to extinguish the mortgage debt. He affirmed the obligation of the mortgagor to insure to be extinguished already by foreclosure, and proceeded on his own account wholly outside of his relations to the mortgagor, as he had a right to do if he chose. But if he chose to do so, he cannot require the mortgagor to pay his bills. We see no sufficient reason for forcing a fiction upon the parties.

The next exception is to the master's charging the defendant with the sum of fifteen hundred dollars a year as the fair rental which might have been earned under prudent management. The evidence is not reported, nor does it appear in terms whether the master found bad faith in the management. The report significantly states that bad faith was charged. We must make such assumptions unfavorable to the defendants as may be necessary to support the master's finding. In cases where there has been no willful default or gross negligence, this court has shown an anxiety, which we fully share, to mitigate rather than to enhance the severe liabilities of a mortgagee in possession: *Gerrish v. Black*, 104 Mass. 400; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 308. But when we are bound, however much we may hesitate in our belief, to assume bad faith on the mortgagee's part throughout the whole transaction, we cannot say that the master erred in holding him liable for what he might have made by reasonable diligence: *Miller v. Lincoln*, 6 Gray, 556; *Richardson v. Wallis*, 5 Allen, 78.

¹²⁶ The same answer may be made when it is argued that the defendant, having sold the premises and bought them in at the foreclosure sale, was holding as owner, and supposed himself to be the owner, owing no one any duty of diligence, and therefore should not be held to account for more than he actually received. If he had practiced a wrong on the plaintiff, the fact that he supposed his wrong to have been effectual gives him no equity. It still is true that, in contemplation of law, he was not the owner, and had no honest reason to think that he was, if he did think so.

His only title to possession as against the plaintiff was as holder of a prior mortgage, and he must account according to his title. The reasoning of *Gerrish v. Black*, 104 Mass. 400, points to our conclusion in a case where the foundation of the mortgagee's possession was bad faith, whether the bad faith extended to the management or not. *Parkinson v. Hanbury*, L. R. 2 H. L. 1, seems to us to contain nothing contrary to our decision, which applies only to the case of a mortgagee who has no honest reason for supposing himself to hold otherwise than as mortgagee. We do not regard it as needing argument to show that the defendant Reynolds, who purchased pendente lite, can stand no better than the original defendant against whom the suit was begun. He took subject to the suit with all its incidents, including the possible amendment of the bill. The answer gave him notice that the foreclosure was relied on, and that the plaintiff must meet it in some way if he was to succeed.

Then it is said that at least the mortgagee was not chargeable after a conveyance of the premises by him pendente lite. It is said that his right to transfer his mortgage is an incident to which the mortgagor's right to redeem is subordinate. The right to transfer a mortgage stands on the same footing as the right to transfer any other property, and a transfer of a mortgage pendente lite has no greater effect upon the right of the parties than any other transfer. Moreover, although the law, for the benefit of the plaintiff, cuts the conveyance down to an assignment of the mortgage, the transfer did not purport to be a transfer of or under the mortgage, but a transfer of the fee: See *White v. Maynard*, 54 Vt. 575, 580.

No error is pointed out to us, nor do we discover any in respect of the allowances for repairs and improvements.

¹²⁷ A question is raised whether the plaintiff's mortgage has been foreclosed, which is not shown to be strictly material to the decision of the case. Upon a bill to redeem, a second mortgagee has a right to an account from a first mortgagee in possession, upon the same principles as the owner of the equity whom he represents: *Jones on Mortgages*, 5th ed., sec. 1118 a. It is very plain, too, that, if the second mortgage is outstanding, the plaintiff's bill cannot be defeated by the defendant's attempt, after failing in his defense, to bring a cross-bill to redeem from the plaintiff's mortgage. Apart from other grounds, the judge would have been justified in his refusal of leave to file the cross-bill by the defendant's delay. But the right of the second mortgagee to redeem from the first mortgage is paramount, irre-

spective of any question of the time or good faith of the defendant's motion: *Moore v. Beasom*, 44 N. H. 215, 218.

But facts were stated at the argument which may make it important to settle at once a matter that must be settled sooner or later, and accordingly we will proceed to decide whether the plaintiff has made out his allegation, or, more accurately, whether we can say that the master's finding to that effect was wrong. It is to be observed that, if the second mortgage is not foreclosed, it is because of the unlawful and wrongful act of the defendant in keeping the plaintiff off the premises, if he did so, and it is by this wrongful act that the defendant now seeks to profit. ¹²⁸ The strength of his case is that, however interrupted, the plaintiff's possession has not been "continued peaceably for three years," and that the statute make possession continued for that time a condition of foreclosure by entry: *Pub. Stats.*, c. 181, sec. 1. But the matter cannot be disposed of so shortly. If the statute was to be made applicable to second mortgagees as fully as it has been, this requirement necessarily had to be treated as satisfied by a fictitious possession, which, whether it would have sufficed to maintain an action of trespass or not (*Thompson v. Vinton*, 121 Mass. 139, 143, and *Tarbell v. Page*, 155 Mass. 256), was supposed to exist alongside of an actual possession of somebody else, and the paramount constructive possession under the same statute of the first mortgagee: *Palmer v. Fowley*, 5 Gray, 545. Having got so far as this, it was natural for the court to go one step further, and to say that the fiction should be maintained in the face of pretty stubborn facts. It has been said and repeated that "the mortgagor, and all claiming under him, are conclusively prevented from holding adversely to his paramount right": *Lennon v. Porter*, 5 Gray, 318, 320; *Ellis v. Drake*, 8 Allen, 161, 163; *Fletcher v. Cary*, 103 Mass. 475, 478; *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 549.

It would be odd if statutory language which seems so clearly to require possession of a kind which is recognized as capable of interruption should be held to have created a purely fictitious and constructive possession with which no one could interfere. But we take the tradition of the court as we find it, and on any question of title apply it as it has been applied. The defendant as first mortgagee has no interest to deny the plaintiff's foreclosure, for reasons which have been given. If he acquired an interest in the equity subordinate to the plaintiff which would give him a better standing, he is subject to the above-quoted

rule, so far as it has been carried by decision. If it should be replied that the defendant in entering and keeping possession was acting by a paramount right, and that he has a right to rely on any effect which that might have, we should rejoin that, viewed in that way, the defendant's possession claiming the fee on the footing that the first mortgage had been foreclosed was not directed against or intended to affect any relations between the plaintiff and the owner of the equity, since all such ¹²²⁹ relations were assumed to be at an end. The requirement by the statute of continued peaceable possession refers to the relations between the mortgagor and mortgagee as such, and not to the relation of third persons, or of the mortgagor in some other capacity than that of mortgagor, to the land. The threats and force which were proved to have been exhibited on the part of the defendant were not intended to exclude the plaintiff, but to deny the claim of his cestui que trust to the hotel on the premises as personal property. What would be the effect of an act devoted to the express purpose of interfering with a foreclosure, we regard as unaffected by our decision.

Decree affirmed.

MORTGAGE—MORTGAGEE IN POSSESSION—RIGHTS AND LIABILITIES—VOID FORECLOSURE SALE.—As a general rule, the mortgagee in possession is bound to the exercise of the same care and supervision over the mortgaged property that a prudent man would exercise over his own: See monographic note to *Caldwell v. Hall*, 4 Am. St. Rep. 69; *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62. Where a mortgagee becomes the purchaser of the mortgaged property at a void foreclosure sale, obtains his deed, enters into possession, and then conveys the premises, his grantee, or any successor in interest of the latter, is an assignee of the mortgage debt and mortgage, and considered as a mortgagee in possession: *Cooke v. Cooper*, 18 Or. 142; 17 Am. St. Rep. 709. A mortgagee wrongfully taking possession is not to be credited with the value of fencing, ditching, and other improvements placed on the premises while he was holding them adversely to the mortgagor: *Mahoney v. Bostwick*, 96 Cal. 53; 31 Am. St. Rep. 175, and note.

LIS PENDENS.—A purchaser of land pendente lite takes his title therein subject to the final decree in the pending suit: *Norris v. He*, 152 Ill. 190; 43 Am. St. Rep. 233, and note. He can make no defense not open to his vendor: *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note. See monographic note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878, on the law of lis pendens.

MORTGAGE—RIGHT OF JUNIOR MORTGAGEE TO REDEEM.—A junior mortgagee has the right to redeem from a sale made under a senior mortgage: See monographic note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 247, as to who may redeem from an execution or foreclosure sale.

MURRAY v. INTERNATIONAL STEAMSHIP CO.

[170 MASSACHUSETTS, 166.]

CARRIER'S LIABILITY FOR BAGGAGE—WHEN HAS NOT COMMENCED.—If a person intending to take passage by a steamboat procures a ticket and sends his baggage to the office of the company on a day in advance of that when he is to take passage, and such baggage is left with an agent, who, however, refuses to receipt for it, the owner not being entitled to a check at that time because not presenting his ticket, such baggage is in possession of the carrier in its character as warehouseman, and it is not answerable, therefore, if it takes the usual precautions, though the baggage is lost.

Tort for the conversion of personal property consisting of the baggage of the plaintiff. On Saturday, June 27, 1896, she bought a ticket which entitled her to transportation and to have the baggage carried with her, and she sent it, contained in a valise, to the office of the defendant, and requested the defendant's agent to receipt therefor. This he declined to do, but took the valise, which was marked with the name of the owner and the place to which she was to be transported. The following Monday, that being the time when the vessel was to sail, the plaintiff applied to have her valise checked, and was told it could not be found. She was not entitled to have it checked, under the rules of the defendant, until she presented a ticket, and this she did not do until Monday. It was admitted that the defendant took the usual precautions for the protection of the baggage. The trial court gave judgment for the plaintiff, and the defendant appealed.

E. R. Champlin and G. L. Wilson, for the defendant.

D. H. Corcoran, for the plaintiff.

¹⁶⁷ LATHROP, J. The defendant received the plaintiff's valise on Saturday, not for immediate transportation, but for the convenience of the plaintiff, as the steamboat was not to sail until Monday. The defendant on Saturday entered into no contract with the plaintiff to carry the valise, and by a rule of the defendant, which we consider a reasonable rule, the valise could not be checked until a ticket should be presented. No ticket was presented until Monday, at which time the valise could not be found. On the facts stated, we are of opinion that the liability of the defendant was that of a warehouseman, and not that of a carrier: *Judson v. Western R. R. Co.*, 4 Allen, 520; 81 Am. Dec. 718; *Barron v. Eldredge*, 100 Mass. 455; 1 Am. Rep. 126; *Watts v. Boston etc. R. R. Co.*, 106 Mass. 466.

To entitle the plaintiff to recover against the defendant as a warehouseman, the burden of proof is on her to show that the defendant was guilty of negligence: *Willett v. Rich*, 142 Mass. 356; 56 Am. Rep. 684. The agreed facts fail to show negligence; and it is expressly stated that the usual precautions were taken. On the agreed facts, therefore, the defendant was entitled to a judgment in its favor: *Lamb v. Western R. R. Co.*, 7 Allen, 98; *Aldrich v. Boston etc. R. R. Co.*, 100 Mass. 31; 97 Am. Dec. 74; *Roberts v. Gurney*, 120 Mass. 33.

Judgment for the defendant.

CARRIERS — LIABILITY FOR BAGGAGE — COMMENCES WHEN.—The liability of a carrier attaches when baggage is received to be transported on any part of the road: *Logan v. Pontchartrain R. R. Co.*, 11 Rob. 24; 43 Am. Dec. 199. A carrier becomes responsible for the loss of the baggage of a passenger as soon as it is delivered to him, although such passenger may not have prepaid his fare: *Woods v. Devin*, 13 Ill. 747; 56 Am. Dec. 483. See, also, *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460.

MANDELL v. FIDELITY AND CASUALTY COMPANY.

[170 MASSACHUSETTS, 173.]

INSURANCE — NOTICE OF ACCIDENT — IMMEDIATE, WHAT IS.—If a policy of insurance is issued undertaking to indemnify the insured for injury resulting from accident caused by horses and vehicles used in his business, requiring him, upon the occurrence of an accident and upon receiving notice of a claim on account of an accident, to give notice in writing of such accident or claim, a notice given at once upon receiving information of the accident must be regarded as immediate, though several days intervened between it and the happening of the accident, if the insured exercised ordinary diligence in adopting such measures as would lead to knowledge on his part of the occurrence of the accident and of claims for damages.

INSURANCE — KNOWLEDGE OF ACCIDENT NOT IMPUTED TO AN INSURED BECAUSE OF THE KNOWLEDGE OF HIS SERVANTS.—Where a policy insuring against injury resulting from accident requires the assured to give immediate notice of the accident, he is not chargeable with notice of an accident because his servants or employes had such knowledge. They are not his agents for the purpose of giving such notice.

INSURANCE — IMMEDIATE NOTICE OF ACCIDENT.—If one, insured against loss from accident is required to give immediate notice of the occurrence of all accidents, himself receives information of a claim that an accident has occurred, and begins, on the next day, an investigation to ascertain the circumstances of the accident, and the nature of claim, and three days later addresses to the insurer a letter giving the notice and information exacted by the policy, the jury is justified in finding that he gave immediate notice within the meaning of the policy. The requirement that notice must be immediately given must have a reasonable construc-

tion, having regard to the circumstances of the particular case. The assured must not be guilty of needless and intentional delay, but is not bound to act instantly, nor without taking reasonable time to procure such information as the requirement is intended to furnish to the party to be notified.

INSURANCE—NOTICE—HOW MAY BE GIVEN.—Where a policy issued by a New York corporation having agents who countersign the policy, doing business in Boston, stipulates that notice of an accident shall be given in writing by the assured to the insurer, but does not provide for the mode of forwarding it, a notice addressed to the corporation and mailed to the office of its agents in Boston is sufficient, though the number of the office is incorrectly stated in the address, if it appears, from the evidence, that the notice was received by the agents in Boston and was soon afterward in the possession of the corporation in New York.

INSURANCE—NOTICE OF ACCIDENT.—Where a policy requires notice to be given to the insurer, it is competent and sufficient to show that notice mailed, or attempted to be mailed, to the insurer reached one of its examiners and was by him sent to the insurer, and was returned to the examiner stamped as having been received by the casualty claim department of the insurer.

INSURANCE AGAINST ACCIDENT—EXPENSES OF LITIGATION—RIGHT TO RECOVER.—Under a policy insuring against loss to be suffered from injuries resulting from accident caused by horses and vehicles used in the business of the assured, he may recover expenses incurred by him in defending an action brought against him by a person injured by an accident of the class against which the insurance was effected.

Action upon a policy of insurance issued by the defendant agreeing to indemnify the plaintiff against liability for injuries resulting from accident by the horses and vehicles used by him in his business of transporting merchandise in the city of Boston. Verdict and judgment for the plaintiff.

J. M. B. Churchill, for the defendant.

S. L. Whipple and W. R. Sears, for the plaintiff, were not called upon.

¹⁷⁴ **BARKER, J.** The accident happened on October 22, 1895. On November 5th the plaintiff received a letter stating that a claim against him had been placed in the writer's hands, and on the next day called upon the writer to ascertain what the claim was, but did not find him, and it was not until a few days later that he first learned that a man had been run over by one of his drivers. He thereupon ascertained the circumstances, and on November 9, 1895, stated them in a letter of that date, which was received by the defendant's agents on November 11th. This letter notified the defendant of the accident, and of the claim on account of it.

The policy required him, "upon the occurrence of an accident, and also upon receiving information of a claim on account of an

accident," to "give immediate notice in writing of such accident or claim." The defense is, that what the plaintiff did was not a compliance with these requirements, and the exceptions are to the admission of the evidence which tended to prove the circumstances above recited, and to the instructions which allowed the jury to find that the plaintiff's conduct was a compliance with his agreement to give immediate notice of the accident and the claim.

The defendant's construction of the policy is, that the notice of the accident must be given at once after it has occurred, and that it is immaterial whether the plaintiff knew of the accident at the time, or was first informed of it thereafter. The defendant further contends that the plaintiff is chargeable with such knowledge of the accident as any of his servants had, and also that there should have been two separate notices, one of the accident and the other of the claim. The defendant's home office was in New York, and its agents, who had countersigned the policy, had an office at No. 70 Water street, Boston. The letter which the plaintiff sent on the 9th of November was directed to the company at No. 7 Water street, Boston, and the defendant contends that, as it was addressed neither to the company at its office in New York nor to its agents in Boston, it could not be found to be a compliance with the requirement of ¹⁷⁵ the policy. The defendant also contends that, as the date of the accident was not shown at the trial, it could not be found that any notice was immediate.

These contentions are technical, and in our opinion unsound. The policy was written in view of the way in which the plaintiff's business was carried on, and is to have a reasonable construction, as a contract by which, for an adequate consideration, the defendant stipulated to give a real indemnity against the plaintiff's liability for injuries resulting from accidents caused by the horses and vehicles used in his business of transporting merchandise in the city streets. His stables were in South Boston, where his teams were kept, and his own stand was in the city proper. He visited the stable at some time daily, but had a foreman who started the teams in the morning, and looked after the stand when the plaintiff was not there. The plaintiff directed where the teams were to go, and what they were to do, and had the oversight of his own business.

1. The construction of the policy adopted at the trial was, that to comply with its requirements the plaintiff was bound to exercise ordinary diligence and care in adopting such measures

as would lead to knowledge upon his part of the occurrence of accidents, and of claims for damages, by proper instructions to his employés, and otherwise, and that he must give immediate notice, upon his earliest receipt of knowledge of an accident, or of information that a claim for damages was made, and that, if he did not know of the accident when it happened, he would not be required to give notice of its occurrence until immediately after he received information of it. This is a reasonable construction, having regard to the situation of the parties and the nature of the contract. It was extremely unlikely that the plaintiff would have personal knowledge of accidents caused by teams which were not under his personal care, but were driven by his servants through the streets of a city. The notice was not required to be given by the driver whose team might cause an accident, but by the plaintiff himself. It would therefore be impossible for notice to be given by the plaintiff until he had himself acquired information, and the requirement must be so construed that an effectual notice could be given in every instance.

¹⁷⁶ The question is not the same as that presented in *Swain v. Security Live Stock Co.*, 165 Mass. 321, cited for the defendant. There the agreement in the policy was, that if the horse should become sick the insured should notify the company within fifteen hours, and that the company might send one of its veterinarians to treat the case; and notice was essential to enable the company to exercise this right, and thereby perhaps prevent the happening of any loss. Here the plaintiff's liability to make compensation, which was the thing insured against, was fixed by the accident itself; and the purpose of notice was to enable the defendant to resist false or exorbitant claims. And in *Swain v. Security Live Stock Ins. Co.*, 165 Mass. 321, while a failure to give notice within the required time was held fatal to the action, the court did not determine or consider whether the time would begin to run before knowledge of the sickness on the part of the plaintiffs or their agent, who had the sole charge of the horse, and kept it at a racetrack in another place than that where the plaintiffs resided.

We are of opinion that, by the fair construction of the policy, the plaintiff's duty to give notice of the occurrence of the accident now in question did not arise until he had knowledge of the accident, and that the instruction to that effect was correct: See *Trippe v. Provident Fund Soc.*, 140 N. Y. 23; 37 Am. St. Rep. 529; *McFarland v. United States etc. Assn.*, 124 Mo. 204;

Manufacturers' etc. Indemnity Co. v. Fletcher, 5 Ohio C. C. 633; Kentzler v. American etc, Assn., 88 Wis. 589; 43 Am. St. Rep. 934; American etc. Ins. Co. v. Norment, 91 Tenn. 1; McNally v. Phoenix Ins. Co., 137 N. Y. 389; May on Insurance, sec. 216.

2. The plaintiff was not chargeable with knowledge of the accident because his servants had such knowledge. Neither his drivers, stablemen, nor foreman were his agents for the purpose of giving notice to the company. They were concerned only with the transportation of merchandise and its incidents, and none of them were authorized or were expected by either party to the policy to do anything as his representatives with the defendant. There was no general agency conferred upon any of his employés. The plaintiff and defendant under such circumstances must be deemed to have intended that the notices would be given upon the knowledge or information of the plaintiff himself.

¹⁷⁷ 3. We are of opinion that, if the jury should find that the first intimation which the plaintiff had that there was any claim against him was the letter which he received on the 5th of November, and which did not inform him of the nature of the claim, and that by an investigation begun the next day he ascertained the circumstances of the accident and the nature of the claim, and sent on the 9th of the same month the letter which was received on the 11th, they might also find that the plaintiff had complied with the requirement that he should give immediate notice. There is nothing in the contention that the same letter could not serve both as a notice of the accident and of the claim. The requirement to give immediate notice is to have a reasonable construction, having regard to the circumstances of the particular case. It forbids intentional and needless delay, but it does not bind the person who is to give notice to act upon the instant, nor without taking reasonable time to procure such information as the requirement is intended to furnish to the party to be notified: The time which intervened between the first intimation which the plaintiff received and the sending of the notice was not so great but that the jury might be allowed to find that, taking into account the circumstances, he used due and reasonable diligence, and so that he gave immediate notice within the meaning of the policy: See Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 384, 49 Am. St. Rep. 467, and cases cited; Baker v. Commercial Union Assur. Co., 162 Mass. 358. Although the precise date of the accident did not appear at the trial, there was evidence from which it could have

been at least approximately found, and the fact that the date did not appear was not conclusive upon the question whether immediate notice was given.

4. The requirement did not stipulate how the notice should be sent to the company at its office in New York, or to its agents who countersigned the policy, and who were in Boston. The mailing by the plaintiff of the letter of November 9th was an act in pursuance of the requirement, and evidence of it was competent under the issue whether notice was given.

The other evidence, admitted under exception, and tending to show the receipt of the letter by the agents in Boston, and also to show that it was shortly after its date in the possession ¹⁷⁸ of the company in New York, was also competent, and justified a finding that notice was given. It was within the proper province of the presiding justice to require the jury to find specially whether the notice was received, and, if so, when.

5. The instruction with reference to Moore, the defendant's examiner, was not to the effect that a notice to him would be sufficient, as the defendant now assumes, but was in substance that, if the defendant received the plaintiff's notice through Moore, it would be sufficient. The evidence as to whom the plaintiff's letter was directed or addressed was conflicting, and Moore having testified that he himself sent it to the defendant at New York, and there being also evidence that it was returned to him stamped as having been received by the casualty claim department of the company on November 11th, the instruction was correct. It did not avoid the effect of the plaintiff's act in sending the notice, that Moore intervened to aid it to reach its proper destination.

6. The defendant also requested an instruction that it was not the duty of the police officer, who after the accident arrested for drunkenness the driver who ran over the person injured, to arrest him for running into that person. The instruction was not given, and rightly, because it was immaterial to the questions upon trial.

7. Evidence of the expenses of defending the suit brought by the person injured, and which the defendant was notified to defend, was competent, and the jury rightly included in the verdict an allowance for such expenses. The contract was for indemnity, and it was the duty and the right of the plaintiff to take all reasonable means to reduce the recovery to a just sum, if the defendant, as it did, neglected or refused to defend the suit, although by the policy it had agreed that it would

defend at its cost any legal proceedings against the assured to enforce claims for injuries: See *Richmond v. Ames*, 164 Mass. 467, 475, and cases cited.

8. It is unnecessary to consider the exception to the refusal of the request that, upon the whole evidence, the plaintiff was not entitled to recover, that request having been founded only on the grounds already discussed.

Exceptions overruled.

INSURANCE—IMMEDIATE NOTICE OF LOSS—WHAT IS, AND WHEN SUFFICIENT.—Where, by the conditions of a policy, notice of loss is required to be given forthwith, it is only necessary that such notice be given with due diligence under the circumstances of the case: *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74. Such condition is to be liberally construed in favor of the insured, and strictly against the insurer: *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and note. See *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395, and note; note to *Ermentrout v. Girard etc. Ins. Co.*, 56 Am. St. Rep. 487. Notice to the company is sufficient, where it is such notice as induces the company to send its agents to the place to investigate the loss, and at all events, where the notice is promptly given to the company's local agents: *Insurance Co. of North America v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497; *Watertown Fire Ins. Co. v. Grover etc. Co.*, 41 Mich. 131; 32 Am. Rep. 146.

BRIERLY v. EQUITABLE AID UNION.

[170 MASSACHUSETTS, 218.]

BENEFICIAL ASSOCIATIONS—ASSIGNABILITY OF CERTIFICATES.—If a benefit certificate is issued to a member, and the by-laws of the association declare that no assignment shall be deemed binding on it unless made upon application to it and accompanied by the payment of a specific fee and the certificate already issued, such by-laws do not prevent the creation of equitable interests in the fund to be collected; and if an assignment is made, though not in the manner specified, the assignee is entitled, in a controversy between him and the administrator of the assignor, to receive the benefit.

Action by the administrator of William Brierly to recover nine hundred and fifty dollars claimed to be due on a certificate of membership issued by the defendant to the decedent. Mary F. Rich appeared and claimed the fund. The trial court decided against her and in favor of the plaintiff, but the trial judge reported the case for the determination of the supreme court.

H. I. Bartlett, for the claimant.

W. H. Niles, for the plaintiff.

²¹⁹ BARKER, J. The benefit certificate was issued to the plaintiff's intestate, a member of the society, and was payable to himself. The society upon being sued appeared, admitted its liability, and under the Statutes of 1886, chapter 281, paid the money into court, and was stricken out as a party. The claimant appeared and filed her claim, and the trial was between the plaintiff and the claimant. As the payment was to be made to the intestate, the legal title to the fund is in the plaintiff; but if the claimant has the equitable interest she will prevail; the statute is broad enough to determine equitable rights and interests, and has been so administered and construed: See *Ware v. Merchants' Nat. Bank*, 151 Mass. 445; *Bridge v. Connecticut Ins. Co.*, 152 Mass. 343; *Dean v. American Legion of Honor*, 156 Mass. 435; *Worthington v. Waring*, 157 Mass. 421, 428; 34 Am. St. Rep. 294. The fund being in the custody of the court, the rights of the plaintiff and the claimant are to be determined as in a suit of interpleader: See *Underwood v. Boston Five Cents Sav. Bank*, 141 Mass. 305.

The certificate, which was issued on April 22, 1890, to the member as sole beneficiary, was assigned by him to the claimant by a written instrument dated March 22, 1892, and again by an instrument under seal, dated October 19, 1893, on which date both of the assignments and the certificate were delivered to the claimant. The member died on December 1, 1893. The assignments were upon valuable considerations in fact rendered, and they purport to assign and transfer the certificate and all advantages to be derived therefrom, and to authorize the claimant to collect whatever benefits and profits may become due from the society. At the death of the member there was due the claimant from him for board, advancements, and services a sum greater than the amount of the fund in dispute.

The certificate and the application have no explicit provision concerning assignments. In the application, the member agrees "to accept any benefit certificate issued hereon, subject to all by-laws which now exist or may hereafter be adopted" by the corporation. By an article of the by-laws no transfer by the member of a benefit certificate, or of any benefit therein specified, shall be deemed or held binding on the corporation unless made upon application to the corporation in a manner determined by its directors, and accompanied with the sum of fifty cents and ²²⁰ the certificate already issued; but the certificate already issued shall remain in force until noon of the day on which the new certificate shall issue in its place. This is applicable to

changes in the designation of the beneficiary, and, if it relates also to assignments by a beneficiary of his interest or right as beneficiary, its effect in any case is limited to the legal right of proceeding against the corporation, and it does not affect the creation of equitable interests in the fund to be collected. By certain "official decisions" printed in the report, and which seem to be merely declarations of what the officers of the corporation supposed to be law, rather than rules of the corporation, it is said that the beneficiary of a member cannot sell or assign his interest in the benefit certificate during the life of the member; that until after the death of the member the beneficiary has no interest in the certificate to assign; that a member cannot use his certificate as collateral; and that certificates are neither commercial paper nor policies of insurance, and cannot be recognized as security, but that the member has full and complete control over his certificate, and can change it at his will and pleasure in the manner provided by law.

When such a society is restricted to furnishing benefits to certain classes, no one outside of those classes can be a beneficiary, and if no proper beneficiary is designated, the law will distribute the fund among those whom the rules of the society or the general laws prescribe; and, in case of such restriction, the money payable under the certificate is no part of the deceased member's estate: See *Briggs v. Earl*, 139 Mass. 473; *American Legion of Honor v. Perry*, 140 Mass. 580; *Daniels v. Pratt*, 143 Mass. 216; *Addison v. New England etc. Assn.*, 144 Mass. 591; *Tyler v. Odd Fellows' etc. Assn.*, 145 Mass. 134; *Skillings v. Massachusetts etc. Assn.*, 146 Mass. 217; *Rindge v. New England etc. Soc.*, 146 Mass. 286; *Massachusetts Catholic Order etc. v. Callahan*, 146 Mass. 391; Stats. 1874, c. 375; Stats. 1877, c. 204, sec. 1; Pub. Stats., c. 115, sec. 8. But if such a corporation is authorized to insure a member for his own benefit, the proceeds of the certificate will go to his executor or administrator for the benefit of his estate, and the limitations of the Statutes of 1874, chapter 375, and the Statutes of 1877, chapter 204, section 1 (Pub. Stats., c. 115, sec. 8), ²²¹ as interpreted in *American Legion of Honor v. Perry*, 140 Mass. 580, and in *Daniels v. Pratt*, 143 Mass. 216, are not applicable to certificates so issued: See Stats. 1885, c. 183; *Harding v. Littlehale*, 150 Mass. 100, 104. If the proceeds of such certificates are to be administered as part of the member's estate, he has power during his life to charge them with equities, as well as to dispose of them by will.

Is the present certificate governed by the provisions of the Statutes of 1885, chapter 183? The Equitable Aid Society had been admitted to do business here. It paid benefits which were "conditioned upon the collection of an assessment upon persons holding similar contracts"; for its agreement is that whenever its membership is "insufficient to enable the payment of a full three thousand dollars certificate from the proceeds of a single assessment, a percentage only shall be paid." It is not shown to come under any of the exceptions stated in the Statutes of 1885, chapter 183, section 1, which would make that statute inapplicable. Under it the society could issue certificates payable to the member himself as beneficiary, and the proceeds of which would be part of his estate: *Harding v. Littlehale*, 150 Mass. 100, 104. Neither the constitution nor the by-laws of the society, nor the statutes or decisions of Pennsylvania referred to in the report, forbid such certificates: See Pa. Stats. 1874, No. 32; Pa. Stats. 1893, No. 5; Pa. Stats. 1893, No. 6; *Vollman's Appeal*, 92 Pa. St. 50; *Beatty's Appeal*, 122 Pa. St. 428; *McNeil v. Golden Cross*, 131 Pa. St. 339, 341; *Jinks v. Banner Lodge*, 139 Pa. St. 414; *Fisk v. Equitable Aid Union*, 20 Week. Not. Cas. 290. These decisions, cited as showing the law of Pennsylvania, were all cases in which there was a designated beneficiary other than the member, and none of them discusses the question whether the member can be himself designated as his own beneficiary, or the effect of such a designation. We find nothing in the law of either state to forbid in this instance the designation of the member as his own beneficiary, and nothing which devotes this benefit to any particular class of persons, or forbids it to be part of the deceased member's estate.

The assignment to the claimant being upon valuable consideration and of the whole fund, her equitable right to the fund should prevail over the legal title of the administrator. Whether ~~222~~ judgment for the plaintiff was entered on the finding the report does not disclose. If so, that judgment and the finding are to be set aside. We find no stipulation in the report which allows us to order judgment for the claimant, and because of the absence of such a provision we cannot now order a judgment for the claimant, although upon the case stated in the report she is entitled to judgment.

Finding for the plaintiff set aside.

MUTUAL BENEFIT SOCIETIES—ASSIGNMENT OF CERTIFICATE—CHANGE OF BENEFICIARY.—The right of a member of

a mutual benefit society to change the beneficiary named in his benefit certificate arises not from the character of the association, but from the contract between the parties. Such change may be made by the assignment of the benefit certificate, which assignment must be as prescribed by the contract itself or the articles of association or by-laws of the society. But, notwithstanding the fact that the acts relied upon are not in exact compliance therewith, equity will sometimes treat the substitution as complete and effectual, as illustrated in a number of cases: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 561-563; *Jory v. Supreme Council*, 105 Cal. 20; 45 Am. St. Rep. 17; monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 790, 791.

LORING v. HILDRETH.

[170 MASSACHUSETTS, 328.]

JUDGMENT.—PARTIES UNASCERTAINED AND UNBORN. WHO ARE CONTINGENTLY INTERESTED in real property, may, under the statutes of Massachusetts, be represented before the court, so that a decree affecting their rights can be entered by appointing a guardian ad litem for them. The suit is then assumed to be a proceeding in rem against the land, in which a decree may be entered which shall operate directly on the land.

CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING JUDGMENTS BINDING PERSONS UNASCERTAINED AND UNBORN is not unconstitutional, if their interests are contingent, and the court is required to appoint a guardian ad litem to represent them, and is authorized to render judgment which shall operate in rem on the land involved.

TRUST DEED NOT DELIVERED NOR ACCEPTED.—A deed executed by the grantor and placed on record by him and purporting to convey the property therein described upon certain trusts, but never delivered to, nor accepted by, the grantee, is wholly inoperative either as a conveyance of the title or as a declaration of trust.

TRUST NOT PERFECTED IN THE MODE ATTEMPTED. If a deed shows an intention to create a trust in a particular manner in which, however, it cannot operate, no intention can be presumed that it should operate in some other manner, and it must hence be adjudged void.

CLOUD UPON TITLE, WHEN MAY BE REMOVED.—If a deed purporting to convey property in trust was executed by the grantor, and by him placed on record, but is inoperative, because never delivered to, nor accepted by, the grantee, a court of equity has jurisdiction to remove the cloud thereby created upon the title, though no one has attempted or threatened to assert title under such deed.

A. L. Huntington and G. P. Smith, for the plaintiffs.

R. D. Weston-Smith, for the defendants.

328 ALLEN, J. This is a bill in equity to remove a cloud upon the title to land in the possession of the plaintiffs, who claim to be the owners thereof. The cloud consists in the rec-

ord of a deed of trust from the late George B. Loring to the late John A. Loring, in trust, "during the life of Anna S. Loring, wife of said George B. Loring, and of Sally P. Loring, the daughter of said George B. Loring, to pay over to them one-half part to each of the net rents and profits thereof, and at the death of either of them, the said Anna S. or Sally P. Loring, to convey her one-half share in the said estate to her heirs at law, or to make such disposal of it as she shall direct by will." There were further provisions, not now material. This deed was signed and put ³²⁹ on record by said George B. Loring, and it was also signed by said Anna S. Loring, to release dower and homestead, but it was never accepted by the grantee, and, upon the facts found at the hearing, it was never delivered: *Barnes v. Barnes*, 161 Mass. 381. It was held by us in *Loring v. Whitney*, 167 Mass. 550, that the existence of this deed and record constituted such a cloud that a purchaser ought not to be compelled to accept a title. The present bill, accordingly, is brought to remove that cloud.

The first question to be considered is, whether the requisite parties are properly before the court; and the only doubt is whether parties unascertained and now unborn, who are contingently interested, can be so represented before the court that a decree affecting their rights can be entered. The Statutes of 1897, chapter 522, provide that in cases like the present a guardian ad litem may be appointed to represent such parties, and that the suit shall be deemed to be a proceeding in rem against the land, and that a decree establishing or declaring the validity, nature, or extent of the plaintiffs' title may be entered, which decree shall operate directly on the land. There is no doubt that the statute is sufficient in its terms to cover the present case, and all requisite steps under the statute have been duly taken.

The question then remains, whether the statute is constitutional, under article 12 of the declaration of rights, which provides that no subject shall be deprived of his property but by "the law of the land"; and the fourteenth amendment of the constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property "without due process of law." It is contended for the defendants that no constructive service of process can reach these persons yet unascertained and unborn. It is conceded that there may be a good constructive service upon nonresidents and unknown persons, because such service enables them to come in and defend;

but it is contended that this rule does not extend so far as to include persons unascertained and unborn, and that no sufficient service can be made upon them, and that therefore the provisions of the Statutes of 1897, chapter 522, do not fulfil the constitutional requirement of due process of law.

If this argument were to prevail, it would often happen that the settlement of a title to land would have to remain in abeyance³³⁰ for an indefinite period of time, in cases where possible contingent interests were shown to exist. If a deed purporting to create such interests were inadvertently or fraudulently put on record, if such a deed were stolen, or even forged, and put on record by the thief or forger—nay, even if a forgery were committed in the registry of deeds by making what appeared to be a record of such a deed, when in fact no such deed or form of deed existed—the courts would be powerless to inquire into and determine the facts because parties purporting to have possible contingent interests could not be brought in or represented. In this way, a title might be tied up for an indefinite period, by an unauthorized or criminal act, with no power in the courts to afford a remedy.

Such a result should not be reached, except upon most stringent reasons of necessity. In *Clarke v. Cordis*, 4 Allen, 466, the constitutionality of the Statutes of 1861, chapter 174, section 1, authorizing compromises of controversies respecting estates in the hands of executors, administrators, guardians, and trustees, was expressly declared. The court said: "Such contingent rights and interests are duly protected by the provision which requires the court to appoint some suitable person whose duty it shall be to represent them in all proceedings under the statute, and by the requirement that the court shall adjudge, on due examination and inquiry, that the proposed award or compromise is just and reasonable in its effect on all contingent interests in the estate in controversy." This decision has stood unchallenged for thirty-five years, and we are satisfied that it rests on sound reasoning. The only difference in principle between that case and this which has been suggested is, that the present proceeding is not in any sense one for the benefit of the defendants who are unascertained or not in being, but is strictly adversary to them. But this distinction does not vary the principle.

The necessity which has been found to exist for acting upon the view that such statutes are constitutional is illustrated by various other statutes which have been cited to us by counsel on

both sides, relating to various proceedings in the probate court, to partition of lands, to the sale of property subject to contingent remainders, and to the determination of ancient conditions and restrictions. These have the effect to show that it has long been ³³¹ assumed and understood that the legislature has power to pass statutes under which such interests may be affected.

It is also contended by the defendants, that, although the deed of trust was never delivered, still the execution and recording of it by Mr. Loring amounted to a sufficient declaration of trust. It is conceded that, under the late English cases, there was no sufficient declaration of trust to be enforced against Mr. Loring, or persons deriving title from him: *Milroy v. Lord*, 4 De Gex., F. & J. 264; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, L. R. 18 Eq. 474; *In re Breton's Estate*, 17 Ch. Div. 416; *In re Shield*, 53 L. T., N. S., 5; *Bottle v. Knockner*, 46 L. J. Ch. 159; *Ex parte Todd*, 19 Q. B. Div. 186. But it is contended that these decisions proceed upon too narrow a ground, and that, although the trust deed of Mr. Loring shows no intention to make himself a trustee, and although there was no valuable consideration, yet that he intended to affect the property with a trust, and that this intention ought to be carried out. The answer to this view is, that the deed shows no intention to create a trust, except in the manner provided. If his intention could not be carried out *modo et forma*, then, so far as appears, there was no intention. The trust fails because there was no intention to create one which can be carried out. It often happens that charitable trusts fail because they cannot be carried out in the mode intended, if there was no intention that they should be carried out in any other mode: See *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401, and cases there cited. So here. The deed shows no intention outside of the mode and form adopted by the deed; and this fails because the deed itself was never delivered. In *Adams v. Adams*, 21 Wall. 185, the court resorted to testimony outside of the deed itself to ascertain the grantor's intention, and there found an intention to create a trust. If resort were had in the present case to outside circumstances, no support is found for the view that the grantor intended to create a trust independently of the deed. Numerous decisions from other states are cited for the plaintiffs, which confirm us in the view that we should not undertake to complete and carry out the trust, which the donor himself clearly abandoned.

We have no doubt of the jurisdiction of the court to enter a decree removing the cloud upon the title, there being no adequate ³³² remedy at law: *Barnes v. Barnes*, 161 Mass. 381; *Russell v. Barstow*, 144 Mass. 130; *Clouston v. Shearer*, 99 Mass. 209; *Burns v. Lynde*, 6 Allen, 305, 312. The fact that these defendants have not done or threatened to do anything in opposition to the title of the plaintiffs does not prevent the giving of the relief prayed for.

Decree for the plaintiffs.

TRUSTS—IMPERFECT CREATION—TRUST DEEDS.—If the intention to give absolutely is evidenced by a writing which does not take effect because of its nondelivery, the court cannot give effect to the intended gift by construing it to be a declaration of trust and therefore valid without delivery: *Wadd v. Hazelton*, 137 N. Y. 215; 33 Am. St. Rep. 707, and note. It is not enough for the donor to execute a paper purporting to pass the legal title, if in fact it does not have that effect: See monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 200.

CLOUD ON TITLE—WHAT CONSTITUTES—WHEN MAY BE REMOVED.—A lien or encumbrance, to throw a cloud on title to real property so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, though in fact irregular and void from circumstances which must be proved by extrinsic evidence: *Murphy v. Mayor etc. of Wilmington*, 6 Houst. 108; 22 Am. St. Rep. 345; *Reyes v. Middleton*, 36 Fla. 99; 51 Am. St. Rep. 17, and note. It is not necessary that one wait until his title is attacked before bringing a bill to remove a cloud upon it: *Arrington v. Liscom*, 34 Cal. 365; 94 Am. Dec. 722.

WYLIE v. COTTER.

[170 MASSACHUSETTS, 356.]

THE LAW OF ANOTHER STATE IS A FACT TO BE PROVED, like any other fact, by evidence. If the evidence consists of a single statute or a decision the language of which is not in dispute, the interpretation of it presents a question of law for the court; but if the law must be determined by construing numerous decisions, more or less conflicting, or bearing upon the subject collaterally or by way of analogy, from which inferences must be drawn, the question to be determined is one of fact and not of law.

LAW OF ANOTHER STATE.—A FINDING OF A TRIAL COURT respecting the law of another state is a finding upon a question of fact, and hence cannot be revised on appeal, unless there was no evidence to warrant it, or, in other words, unless the statutes and decisions offered in evidence conclusively show, in spite of any possible inferences of facts, or doubts in the interpretation of them, that such finding is wrong.

NEGOTIABLE INSTRUMENTS PAYABLE ON DEMAND—LIABILITY OF INDORSERS.—If a note is given, payable on demand, without interest, and is indorsed before its delivery, and the consideration is advances to be made, a demand of payment made

fourteen months after the last advancement is not within a reasonable time, and the indorser cannot be held liable thereon.

J. C. Burke and S. F. Jarvis, Jr., for the plaintiff.

F. R. Hall, for the defendant.

³⁵⁷ KNOWLTON, J. The note in suit was payable in New York, and was made and delivered there. The rights and liabilities of the parties are, therefore, to be determined by the laws of New York: *Lawrence v. Bassett*, 5 Allen, 140; *Woodruff v. Hill*, 116 Mass. 310; *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372.

By the law of New York, one who puts his name on the back of a note before delivery, as the defendant in this case did, is a mere indorser, and not a joint maker or guarantor. Like that of any other indorser, his liability does not become absolute until after a proper demand and notice: *Hall v. Newcomb*, 7 Hill, 416; 42 Am. Dec. 82; *Meyer v. Hibsher*, 47 N. Y. 265; *Phelps v. Vischer*, 50 N. Y. 69; 10 Am. Rep. 433.

In the present case, a demand was made and notice was given on or about July 31, 1893, more than a year and a half after the date of the note, which by its terms was payable on demand. The question is, whether this was within a reasonable time, so that the indorser was charged thereby. To show the law of New York bearing upon this question, certain statutes, together with thirty-five decisions of courts in that state, were put in evidence. The law of another state is a fact to be proved, like any other fact, by evidence. Where the evidence is a single statute or a decision of a court, the language of which is not in dispute, the interpretation of it presents a question of law for the court; but where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences must be drawn from them, the question to be determined is one of fact, and not of law: *Hackett v. Potter*, 135 Mass. 349; *Shoe etc. Nat. Bank v. Wood*, 142 Mass. 563; *Ufford v. Spaulding*, 156 Mass. 65; *Bride v. Clark*, 161 Mass. 130.

In the present case, it is not contended on either side that any statute or decision introduced in evidence relates to a contract ³⁵⁸ identical with that before us, but the counsel for the plaintiff argues from the cases in New York on one side and the other that the principles established, when applied to this note, entitle him to a verdict; while the counsel for the defendant ar-

gues to the contrary. The judge of the superior court, in considering the evidence, was called upon to determine, as well as he could, what is the present state of judicial opinion in the highest court of New York in reference to the question before him, as manifested by the published decisions of that court. The matters involved in reaching this conclusion presented a question of fact. On this bill of exceptions we cannot revise his finding upon this part of the case, unless it appears that there was no evidence to warrant it, or, in other words, unless the statutes and decisions conclusively show, in spite of any possible inference of fact or doubts in the interpretation of them, that his finding is wrong.

The plaintiff relies principally upon *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243, the headnote of which is as follows: "A promissory note, payable on demand, with interest, is a continuing security; an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time." So far as appears, this case has never been overruled, but it has been, at different times, reaffirmed: *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Parker v. Stroud*, 98 N. Y. 379; 50 Am. Rep. 685. On the other hand, the courts have been disinclined to extend it. In *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461, Foster, J., speaking for the court, says: "I think the case of *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243, has extended the principle of continuing security in such a case to the very verge." See, also, *Crim v. Starkweather*, 88 N. Y. 339; 42 Am. Rep. 250.

In the opinion in *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243, much stress was laid upon the fact that the note, although payable on demand, expressly provided for payment of interest. The court said: "If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon on a check or sight draft." This distinction between demand notes bearing interest and those not bearing interest was made in *Wethey v. Andrews*, 3 Hill, 582, and recognized in *Salmon v. Grosvenor*, 66 Barb. 160, and in later cases. ³⁵⁰ The note in suit does not bear interest. The plaintiff seeks to bring the case within the doctrine of *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243, by reason of the letter which was sent by the plaintiff's agent with the note; but the defendant was not a party to the letter

and did not authorize it. She is not bound by its language. By writing her name on the back of the note and leaving it, under the circumstances disclosed, she bound herself in favor of one receiving it in good faith and for value in the form in which it appears. She did not authorize anybody to bind her by a writing other than the note. So far as the arrangement made in regard to the consideration of the note bears upon the construction of it, her liability may be affected. The testimony was, that the consideration was made up of two thousand dollars, already due the plaintiff from the firm of Richard H. Dana & Co., and three thousand dollars to be advanced to that firm. The last of these advances was made on or about June 1, 1892. In the view most favorable to the plaintiff, the letter can only be considered as a part of the evidence in regard to the consideration of the note. Under the law of New York, is a note written in this form, given for such a consideration, to be deemed a continuing security on which the indorser is liable for an indefinitely long period without a demand and notice? It is one question whether it is a continuing security until the advancements have been made to the amount agreed upon, and it is a different question whether it is to be a continuing security after that. That it is written without interest is an important fact in the light of the authorities in New York. If the consideration had been money lent to the amount of five thousand dollars when the note was given, it seems pretty clear under the authorities in New York that the note in its present form would not be a continuing security on which an indorser would remain liable for six years without a demand or notice. The question before the superior court upon this branch of the case was by no means free from difficulty. We think it cannot be said, as matter of law, that the finding of the judge upon the evidence was erroneous.

If the rule applicable to an ordinary indorser of a demand note, payable without interest, is to be applied, we are of opinion that the demand made fourteen months after the last advancement of the consideration was not within a reasonable time:

³⁶⁰ *Sice v. Cunningham*, 1 Cow. 397; *Alexander v. Parsons*, 3 Lans. 333; *Herrick v. Woolverton* 41 N. Y. 581; 1 Am. Rep. 61; *Field v. Nickerson*, 13 Mass. 131; *American Bank v. Jenness*, 2 Met. 288; *Martin v. Winslow*, 2 Mason, 241.

Exceptions overruled.

EVIDENCE—LAWS OF ANOTHER STATE.—Statutes of another state must be pleaded and proved as any other fact: *Schultz v.*

Howard, 63 Minn. 196; 56 Am. St. Rep. 470, and note. Judicial notice cannot be taken of the statutes of another state nor of their interpretation by its courts: Hancock Nat. Bank v. Ellis, 166 Mass. 414; 55 Am. St. Rep. 414, and note.

APPEAL—REVIEWING FINDINGS OF FACT.—Findings of fact in a case cannot be reviewed on appeal: Heyward v. Farmers' Min. Co., 42 S. C. 138; 46 Am. St. Rep. 702; if supported by competent evidence: Edwards v. Reid, 39 Neb. 645; 42 Am. St. Rep. 607.

NEGOTIABLE INSTRUMENTS—PAYABLE ON DEMAND—PRESENTMENT FOR PAYMENT.—Negotiable instruments payable on demand, whether with or without interest, mature as to the indorser thereof only when payment is demanded, and it must be demanded within a reasonable time: Leonard v. Olson, 99 Iowa, 162; 61 Am. St. Rep. 230, and note. What is an unreasonable delay depends upon the circumstances of the case: Turner v. Iron etc. Co., 74 Wis. 355; 17 Am. St. Rep. 168, and note; note to Merritt v. Todd, 80 Am. Dec. 251; Goodloe v. Godley, 13 Smedes & M. 233; 51 Am. Dec. 159.

WELCH v. HENSHAW.

[170 MASSACHUSETTS, 409.]

A GIFT OR VOLUNTARY TRUST WILL NOT BE ENFORCED by a court unless fully completed.

TO RENDER A VOLUNTARY SETTLEMENT VALID AND EFFECTUAL the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer it and render the settlement binding upon him.

TRUSTS, VOLUNTARY, WHEN NOT CREATED.—If, after the death of the holder of certificates of deposit, they are found among her papers, together with directions in her handwriting for their disposition by certain persons as trustees in case she does not dispose of them before her decease, but neither the trustees nor the beneficiaries were informed of the proposed trust, no trust is created. A voluntary trust of which the settler has attempted to make himself the trustee, where he has kept the property in his hands subject to his own disposal, and never informed the beneficiaries, cannot be supported.

J. F. Tyler, for the executors and trustees under the will of Josiah Putnam Bradlee.

H. N. Shepard, C. H. Stebbins, and O. Storer, for certain legatees.

409 FIELD, C. J. This is a petition or bill for instructions brought by one of the executors of the will of Helen C. Bradlee, late of Boston, deceased, the other executors, Samuel Henshaw and Joseph P. B. Henshaw, being made defendants, as they are personally interested in the question submitted. By her will, dated May 29, 1896, Helen C. Bradlee gave the residue of her property to Annie M. Henshaw, Elizabeth L. Henshaw,

Samuel Henshaw, and Joseph P. B. Henshaw, share and share alike; and all these persons have been made defendants. William L. Strong and William H. Hodgkins, surviving executors and trustees under the will of Josiah Putnam Bradlee, also have been made defendants. Nathaniel J. Bradlee, who was an executor and a trustee with them, has deceased. It appears to have been taken for granted by all the parties that there is sufficient property of the estate of Helen C. Bradlee, other than that represented by the certificates hereinafter mentioned, to pay the debts and charges of administration, and to satisfy all ⁴¹⁰ the legacies contained in her will except those in the residuary clause.

A part of the residuary clause of the will of Josiah Putnam Bradlee is as follows:

"Tenth. All the rest, residue, and remainder of my estate real and personal of which I shall die seised or possessed, or to which I may at my decease be in any way entitled or over which I may have any right of disposal, I give, devise, and bequeath to Nathaniel J. Bradlee of said Boston, said William L. Strong and the said William H. Hodgkins, the survivors and survivor and his heirs, in trust, and to and for the uses and purposes hereinafter set forth, namely:

"To take charge of the same, and especially of the land, buildings, mills, machinery, and other property situate at Ballardvale in Andover in the county of Essex and said commonwealth, now used and improved for manufacturing purposes, . . . and they shall pay the net income of said business, and all other net income received by them and not otherwise disposed of by this will, to my said sister Helen, during her life, upon her written request therefor; but, if my said sister Helen makes no such request during the continuance of said business, they shall retain and hold said net income and profits as an addition to and part of the principal fund held by them in trust; . . . and upon her decease, and when said business at Ballardvale has been closed and sufficiently settled to enable them to do so, to pay over, distribute, and convey the property held in trust, with all accumulations and additions, and including therein all contingent interests not herein fully disposed of as and when they fall in, to such charitable institutions of a public nature as in Massachusetts may legally receive and hold the same, and are not sectarian in character or purpose, and in such proportions as they see fit, provided, however, that if my said sister Helen shall, by will or instrument in the nature thereof, direct that said

property, or any part thereof, shall be paid over and distributed to any such charitable institutions, or to any personal friends of hers or mine, the trustees acting under this will shall pay over and distribute it in such manner and in such sums as she shall direct."

Under this residuary clause of the will of Josiah Putnam Bradlee, the trustees paid over to Helen C. Bradlee, upon her ⁴¹¹ written request, large sums of money out of the income of said trust property. At the time of her decease there were standing in her name in the Boston Safe Deposit and Trust Company certain amounts of money represented by certificates of deposit, of different dates and for different sums, amounting in the whole, without including the interest allowed by said company, to one hundred and fifteen thousand dollars. Some of said certificates were marked "Not subject to check," and others were not.

The dates and amounts of the certificates are as follows: August 1, 1890, \$20,000; August 4, 1891, \$10,000; January 28, 1892, \$10,000; February 3, 1893, \$20,000; March 16, 1894, \$500; March 16, 1894, \$500; March 16, 1894, \$500; March 16, 1894, \$500; August 27, 1894, \$5,000; February 11, 1895, \$2,000; July 16, 1895, \$5,000; July 16, 1895, \$4,000; July 16, 1895, \$5,000; July 16, 1895, \$2,000; July 16, 1895, \$2,000; July 16, 1895, \$2,000; October 21, 1895, \$3,000; January 30, 1896, \$10,000; January 30, 1896, \$10,000; March 10, 1896, \$1,000; March 10, 1896, \$1,000; March 10, 1896, \$1,000. On many of these certificates there were indorsements of the payment of interest up to January 1, 1896.

The statement of the bill, which is admitted to be true, concerning the finding of these certificates, is as follows:

"And your petitioner further represents that the executors found said certificates in her trunk or box, kept in her house, in her own custody, during her lifetime; that in said trunk were her certificates of personal property, the deed of her house on Ashburton Place, in which she lived, and deeds of other real estate no longer belonging to her; that her will was also in said trunk in an envelope, and the above described certificates in another envelope, directed 'To the Trustees of the Ballardvale Property,' inside of which envelope was a smaller envelope directed to 'Messrs. Wm. L. Strong and Wm. H. Hodgkins, Trustees of Ballardvale Mills'; that all of said envelopes were unsealed; that there was also in the box a paper in these words, namely:

"On the following page are directions to the Trustees of the

Ballardvale Property how to dispose of the certificates in my name deposited in the Boston Safe Deposit and Trust Company, and if I do not dispose of the whole amount of the certificates ⁴¹² received and deposited in the Boston Safe Deposit and Trust Company before my decease, the amount of the remaining certificates is to be added to my brother's property and given to the charitable institutions which I have selected for the residue and the remainder of the property in a testament previously made.

"Directions to the Trustees of the Ballardvale Property for the disposal of the certificates in my name in the Boston Safe Deposit and Trust Company:

"To the Josiah P. Bradlee Ward in the Massachusetts Eye and Ear Infirmary for a Permanent Fund, \$10,000.

"To the J. Putnam Bradlee Ward in the Massachusetts General Hospital for a Permanent Fund, \$20,000."

"Also another paper, pinned upon the other, with these words and letters following:

"To the MacLean Hospital for a Permanent Fund, \$20,000.

"To the MacLean

"To the'

"These last two papers were probably written by Miss Bradlee before the date of the will, but when your petitioner is unable to ascertain; they were, as well as the will, in her handwriting. The will was dated and executed May 29, 1896, six days before her decease, and was, as far as known, prepared by herself."

It is evident that the money represented by these certificates must have been the absolute property of Helen C. Bradlee, even although it had been derived from the income paid over to her by the trustees under the will of Josiah Putnam Bradlee. It also is evident that the direction to said trustees, found in her trunk, cannot be regarded as an execution of the power given to her in the latter part of the residuary clause of the will of Josiah Putnam Bradlee, because that is a power over the trust property remaining in the hands of the trustees, and these directions are not executed as a "will or instrument in the nature thereof." There is nothing in the papers before us indicating that Helen C. Bradlee made any will or instrument in the nature of a will other than that of May 29, 1896.

The question is, whether the facts stated in the bill establish a gift or transfer of the certificates to Strong and Hodgkins, as ⁴¹³ trustees under the will of Josiah Putnam Bradlee, or an effective declaration of trust on the part of Helen C. Bradlee, to

be carried into effect by said trustees according to her directions and the will of Josiah Putnam Bradlee. This court enforces gifts or voluntary trusts only when they are "fully completed and executed": *Stone v. Hackett*, 12 Gray, 227. That there has been no complete gift or transfer of the certificates to Strong and Hodgkins, trustees, is evident, because there has been no delivery of them to the trustees, or to anybody for the trustees, and nothing has been done which is equivalent to a delivery. It is equally evident, we think, that by the papers found in her trunk Helen C. Bradlee did not constitute herself a trustee of these certificates for the trustees under the will of Josiah Putnam Bradlee, to be disposed of by them according to her directions so far as she left directions, otherwise under the directions given them in the will of Josiah Putnam Bradlee. These papers do not purport to constitute her a trustee for the benefit of the trustees under the will of Josiah Putnam Bradlee and for the beneficiaries she names, and their contents imply that she retained the right to dispose of all the certificates at any time before her death. No communication whatever appears to have been made by her of the existence of these papers to the trustees, or to any of the beneficiaries designated, and she retained the exclusive control of the papers until her death. Apparently the directions were left incomplete: *Keniston v. Mayhew*, 169 Mass. 166; *Noyes v. Institution for Savings*, 164 Mass. 583; 49 Am. St. Rep. 484; *Booth v. Bristol County Sav. Bank*, 162 Mass. 455; *Barnes v. Barnes*, 161 Mass. 381; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218; *Fearing v. Jones*, 149 Mass. 12; 14 Am. St. Rep. 392; *Miller v. Le Piere*, 136 Mass. 20; *Cummings v. Bramhall*, 120 Mass. 552, 564; *Shurtleff v. Francis*, 118 Mass. 154; *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222.

The English law on this subject is said by Lord Justice Turner, in *Milroy v. Lord*, 4 De Gex, F. & J. 264, to be as follows: "I take the law of this court to be well settled that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary ⁴¹⁴ to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those

purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried": See *Loring v. Hildreth*, 170 Mass. 328; ante, p. 301.

Milroy v. Lord, 4 De Gex, F. & J. 264, was cited in *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 163, 35 Am. Rep. 365, and it was there said: "But whether he [the settler] had done enough depended, as we have seen, on whether his conduct and declarations manifested a completed and executed intention in regard to it. Notice to the donee is indeed not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but, where the transaction is capable of two interpretations and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would in most cases be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust."

In *Alger v. North End Sav. Bank*, 146 Mass. 418, 422, 4 Am. St. Rep. 331, it was said: "But a mere declaration of trust by the owner, not communicated to the donee and assented to by him, or a mere ⁴¹⁵ deposit of the fund in his own name as trustee, or a deposit in the name of another, will not be of themselves alone sufficient to prove a complete gift or voluntary trust: *Sherman v. New Bedford Sav. Bank*, 138 Mass. 581, and cases cited."

In *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255, the instructions which were approved were as follows: "The jury were also told, in substance, that what was written in the bank-book was not enough, but that in addition to that the testator must have indicated to the plaintiff in some form of language that the deposit then belonged to him, although he could not have it until his father's death, and that this was assented to by him."

In *Taft v. Stow*, 167 Mass. 363, the declaration alleged "that the testatrix communicated to the plaintiff this declaration of trust, with all its terms and conditions": See, also, *Richardson v. White*, 167 Mass. 58; *Keniston v. Mayhew*, 169 Mass. 166.

So far as we are aware, there are no decisions in this commonwealth which support a voluntary trust, of which the settler has attempted to make himself the trustee, where the settler has kept the property in his own hands subject to his own disposal, and never has informed the beneficiaries of it.

We are of opinion that the certificates of deposit and the money they represent are a part of the estate of Helen C. Bradlee, to be administered in accordance with her will. A decree should be entered accordingly.

So ordered.

TRUSTS—VOLUNTARY—WHEN VALID.—A voluntary trust is an equitable gift, and like a legal gift *inter vivos* must be complete: *Bath Sav. Inst. v. Hathorn*, 88 Me. 122; 51 Am. St. Rep. 382, and extended note. For a discussion of the cases in which voluntary trusts will arise from the declarations of a trustor, see monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 189-224.

NEIMAN v. BEACON TRUST COMPANY.

[170 MASSACHUSETTS, 452.]

BANKERS—LIABILITY TO PERSONS MAKING JOINT DEPOSITS.—If persons deposit moneys with a bank in their joint names, with directions that payment shall be made only on their joint checks, the banker has no right to assume that their rights are equal or will remain so, and if he pays the whole to one of them without authority from the other, the latter may recover his interest in the fund at the date of such payment, though in excess of one-half thereof.

Action to recover the amount of a deposit. The defendant, in 1896, received a deposit in the joint names of the plaintiff and Rebecca M. Feldman of the sum of six hundred dollars, and agreed not to pay any part thereof except upon the joint check of both depositors. A few days later, the bank, on the representation of Rebecca M. Feldman that she had become the owner of the whole deposit, paid her the entire amount thereof without any authority from, or communication with, her codepositor who brings this action, claiming that, at the time of such deposit, he was the owner of three-fourths of the deposit, and that, though the depositors were equally interested in the deposit when made, he had acquired an additional one-fourth interest thereof before

the time of the wrongful payment. The bank admitted its liability for one-half of the amount of the deposit. The depositors, at the time of the deposit, were engaged to marry each other under a Jewish custom, evidenced by an agreement in writing, and providing that, in case the agreement was broken by either party, there should be forfeited to the other one-half of the amount put into the joint deposit by the forfeiting party. It was admitted that Miss Feldman broke her engagement, and, further, that the bank had no knowledge of either the agreement or the breach thereof at the time of making the payment to her.

M. Dolan, for the defendant.

J. H. Appleton, for the plaintiff.

⁴⁵³ ALLEN, J. The defendant does not deny that the plaintiff is entitled to sue alone: *Boston etc. R. R. Co. v. Portland etc. R. R. Co.*, 119 Mass. 498; 20 Am. Rep. 338. The only question is as to the amount which the plaintiff is entitled to recover.

The deposit was made jointly. At the outset each depositor owned one-half of it. But it does not appear that the defendant was aware of this. The defendant made no inquiry, and no stipulation to limit the amount of its liability in case of a wrongful payment by it. Ordinarily, a party should be allowed to recover according to his actual interest at the time of the payment. If the actual interest of the plaintiff had become reduced to a quarter or an eighth of the deposit, it would be a hardship to compel the defendant to pay to him a full half, merely because he had owned one-half at the outset. Since it happens that his interest has increased in amount, it is no hardship to compel the defendant to reimburse him for his actual loss. ⁴⁵⁴ The defendant must be held to have contemplated that there might be a change in the amount of the respective interests of the depositors. The circumstances of the change are unusual; but that is immaterial.

Judgment affirmed.

BANKS AND BANKING—JOINT DEPOSITS—PAYMENT OF CHECKS UPON.—If several persons, not being partners, make a deposit to their joint credit, the bank ought, strictly speaking, to have the signatures of all of them appended to a check before paying it: *Morse on Banks and Banking*, 3d ed., sec. 435. Thus, where a bank has notice of a partnership agreement that checks upon a deposit made with it shall be signed by both partners, but nevertheless pays money therefrom upon the check of one partner, it is liable to the firm if such money was not applied upon firm obligations: *Granby Min. etc. Co. v. Laverty*, 159 Pa. St. 287. See *Coote v. Bank of United States*, 3 Cranch C. C. 50.

WHITCOMB v. BACON.

[170 MASSACHUSETTS, 479.]

BROKERS—RIGHT TO COMMISSION WHERE TWO OR MORE HAVE GIVEN SERVICES.—Where two or more brokers have engaged in bringing about a sale of real property, a recovery of commissions cannot be supported in favor of one of them who does not show that his services were the efficient means of bringing about the actual sale. There cannot be a recovery in favor of both, though both have rendered services meritorious and essential in producing the result, and without which it would not have been accomplished. A discrimination must be made between them to ascertain whose services must be deemed the efficient and effective cause of the sale.

Action to recover commissions claimed to have been earned by the plaintiffs as brokers in effecting a sale of real estate. The plaintiffs, by their employés, made efforts to sell the property to one Wentworth for sixty-six thousand dollars, who, however, after examining it, said it was not available for the use which he contemplated, and that he would not give the price asked, but might possibly give sixty-three thousand dollars. At this price the defendants refused to sell. Some weeks later, the property was sold to Wentworth by a broker named Bowker for the sum of sixty-three thousand dollars. Verdict for the plaintiffs, and the defendant alleged exceptions.

G. D. Burrage, for the defendant.

S. L. Whipple and W. R. Sears, for the plaintiffs.

451 ALLEN, J. It has been held by us in two recent cases that a broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it, but he must also show that his services were the efficient or effective means of bringing about the actual sale: *Dowling v. Morrill*, 165 Mass. 491; *Crowninshield v. Foster*, 169 Mass. 237. Where two or more brokers are employed, there is no implied contract to pay more than one commission, and it therefore becomes necessary to lay down a rule for determining which one of different possible claimants is entitled to be paid. A similar rule exists in the law of insurance, stated thus in *Phillips on Insurance*, fifth edition, section 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." And again, in section 1137: "If, where different parties, whether the

assured and the underwriter, or different underwriters, are responsible for different causes of loss, which concur in the loss, and the damage by each cause cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss." This latter rule is expressly accepted as correct in *Howard Ins. Co. v. Norwich etc.* 482 *Transp. Co.*, 12 Wall. 194, 199, the court saying: "When there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." In determining what constitutes proximate cause, the same considerations apply equally in actions of contract and of tort: *New York etc. Exp. Co. v. Traders' etc. Ins. Co.*, 132 Mass. 377; 42 Am. Rep. 440. It may be that there are different causes which assist in producing a result, and that the result would not have happened if either one of the different causes had been wanting. A familiar example is found in cases where there has been a delay by a carrier in transporting goods, which are afterward destroyed by flood or fire: *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Denny v. New York Cent. R. R. Co.*, 13 Gray, 481; 74 Am. Dec. 645; *Memphis etc. R. R. Co. v. Reeves*, 10 Wall. 176. So where several brokers have each endeavored to bring about a sale which finally is consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found the customer who otherwise would not have been found, and yet the customer may refuse to conclude the bargain through his agency; and another broker may succeed where the first has failed. In such a case, in the absence of any express contract, that one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale, or, to use the language of Phillips, the predominating efficient cause.

The instructions of the learned judge to the jury laid special stress on the inquiry whether the sale would have been made but for the efforts of the plaintiffs. He said: "The real question is here, whether you are satisfied that this sale to Wentworth would not have been made but for the efforts which the plaintiffs had made to induce him to buy it. That is the real question." And afterward: "The real question is, and it is the crucial question in my judgment, whether the sale would have taken place without the efforts made by the plaintiffs. If it would, then the plaintiffs have not made the sale, and they cannot recover the

commission unless they have. If, however, you are satisfied this sale as made would not have taken place unless the plaintiffs had done what they did, and that what they had done ⁴⁸³ was at the time of the sale an operating cause, not the sole cause, but one of the controlling causes of the sale (and the burden is upon the plaintiffs to satisfy you of that), then the plaintiffs can recover." This rule, as it seems to us, would allow two brokers to recover commissions upon the same sale. There might be another broker whose services were equally meritorious and essential in producing the result. But in such a case it is not enough to show that one of several causes stood in such a relation to the result that without it the result would not have happened, and that it was one cause amongst others which assisted or contributed in producing it. It becomes necessary to make a discrimination between the causes, and to ascertain which is the particular cause that can be called the efficient or effective one. In addition to the cases cited in *Dowling v. Morrill*, 165 Mass. 491, see *Michigan Cent. R. R. Co. v. Burrows*, 33 Mich. 6, 15; *Behling v. Southwest etc. Pipe Lines*, 160 Pa. St. 359; 40 Am. St. Rep. 724; *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; discussing questions of *causa causans*, as distinguished from *causa sine qua non*.

Exceptions sustained.

BROKERS—RIGHT TO COMMISSIONS—SALE COMPLETED BY ANOTHER PARTY.—A real estate broker is entitled to his commission if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the principal in person: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683, and note; extended notes to *Kalley v. Baker*, 28 Am. St. Rep. 547, and *Ward v. Cobb*, 12 Am. St. Rep. 590. A broker prevented from completing business by an employer is entitled to compensation for services performed. Consequently, if a broker employed to sell a piece of land finds a purchaser, but has the business taken out of his hands and given to another broker, who completes the purchase at the terms agreed upon, he is entitled to his commissions: *Gottschalk v. Jennings*, 1 La. Ann. 5; 45 Am. Dec. 70. But he has no right to commissions if his services fail to accomplish a sale, and after a proposed purchaser has decided not to buy, other persons induce him to do so: *Earp v. Cummins*, 54 Pa. St. 394; 93 Am. Dec. 718; monographic note to *Walker v. Osgood*, 93 Am. Dec. 176.

BENTON v. SPRINGFIELD YOUNG MEN'S CHRISTIAN ASSOCIATION.

[170 MASSACHUSETTS, 534.]

ARCHITECT—CONTRACT FOR THE EMPLOYMENT OF, WHAT IS NOT.—The publication of a notice to architects to compete for plans for a building proposed to be erected by an association, reserving, however, the right to reject all plans, followed by a rejection of all the plans submitted, but accompanied by a vote of a committee of the association that one of the persons thus submitting plans should be chosen architect, does not constitute a contract between him and the association, where the vote is not formally communicated to him. The committee may, therefore, rescind its vote and employ another architect.

E. R. Anderson, for the plaintiff.

S. Lincoln, for the defendant.

535 ALLEN, J. The "notice to architects" issued by the committee of the defendant invited the plaintiff and other architects "to participate in the competition for plans, on the conditions" therein stated. One of these conditions was, that "the committee reserve the right to reject any and all of the designs submitted." According to the plaintiff's offer of proof, he presented to the committee a full set of drawings of the proposed building. Other architects did the same. The committee thereupon, on May 19, 1893, passed a vote "that we proceed to examine drawings and specifications presented to us on basis of compliance with each and every requirement in our letter of invitation, and, after considering and discussing each requirement separately, a vote of the committee be taken as to which plan best meets the letter of requirements and the needs of the association, and that on completion of this examination we select the architect who has the largest number of votes." The offer of proof also states that the committee "agreed that the person who should receive the greatest number of votes should superintend the construction of the same." This can mean only that they so agreed amongst **536** themselves. The next day, another meeting of the committee was held, and the plaintiff was found to have received the greatest number of first marks in the competition. Afterward at this meeting the committee voted to reject all the plans submitted, and to return them to their owners, and all the plans were rejected. Immediately after this vote had been passed, another vote was passed that the plaintiff "be chosen architect in accordance with the vote of last night," the words "vote of last night" having reference to the receipt of the great-

est number of first marks. This vote remained upon the books of the defendant for forty days without being changed, at the end of which time it was rescinded. The committee did not, as a committee, communicate this vote to the plaintiff or ask him to act under it, but two members of the committee notified him that he had been appointed as architect of the building, and this fact was known to the secretary of the committee, and also to other members of the committee, who made no objection to the notification, and did nothing in regard to the matter until the time of passing the vote of rescission. On July 3, 1893, the plaintiff wrote a letter to the committee claiming to act as architect, and saying that he had just heard that the committee had lately taken action which appeared to show their intention to deprive him of the position. The committee answered that no contract with him had been made. The offer of proof stated that this letter of the plaintiff was written within the forty days; but by the dates given the time is forty-four days. No explanation of this apparent inconsistency has been given to us, but in the view we take of the case it becomes immaterial. The subsequent statement, that these letters were not written until after the vote appointing the plaintiff had been upon the books for about forty days, and the members of the committee had known that the plaintiff had been notified as aforesaid, must be construed to refer only to those members of the committee previously referred to, as knowing the fact of the notification given to the plaintiff by two members of the committee.

It is apparent, in the first place, that no contract arose out of the "notice to architects" and the presentation of plans by the plaintiff, because the right to reject any and all of the designs submitted was expressly reserved, and this right was exercised by a formal vote.

⁵³⁷ The plaintiff, however, contends that his presentation of plans was an offer of his services as architect of the building, and that this offer was accepted by the vote of May 20th. There is nothing in the offer of proof to support this position. The notice to architects called simply for the submission of plans, with a description and explanation of them. Rejected designs were to be returned to their authors without any compensation. The plaintiff submitted drawings "in the manner specified." There is nothing to show that, either by express words or by implication, he offered, or was understood to offer, his services as architect, unless his plans should be accepted. The vote rejecting his plans rejected all that he had offered.

The new vote, that he be chosen architect, was not an offer to him. It was not communicated to him by the committee, nor voted to be so communicated. Those members who gave notice of the vote to the plaintiff did not act for or by authority of the committee. Their notification was not official, and did not purport to be so. The vote did not specify any terms or duties in detail, and it was not in form or intention a contract or the offer of a contract. It was merely an initiatory step, signifying the intention or purpose of the committee, and was not an act by which they meant to be bound as by a contract. If the plaintiff had notified them at once that he would act as architect, in pursuance of their vote, they might have answered that their vote was not a proposal or offer to him: *Shaw v. Stone*, 1 Cush. 228, 244; *Dunham v. Boston*, 12 Allen, 375; *Sears v. Kings County Elevated Ry. Co.*, 152 Mass. 151; *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 528.

If the plaintiff's letter was sent after the formal rescission of the vote, the plaintiff would fail to maintain his case for the additional reason that his acceptance of an offer after it had been recalled would be too late. But the decision is not put upon that ground, because upon the facts stated the vote was not a proposal or offer to him, and he could not convert it into a contract by signifying his acceptance of it, even though he acted promptly.

Exceptions overruled.

ARCHITECT—WHEN MAY NOT RECOVER UPON CONTRACT OF EMPLOYMENT.—A case similar to the principal case is *Tilly v. County of Cook*, 103 U. S. 155, wherein there was an offer of a premium for plans of some proposed building. The plaintiff furnished one plan and received the promised compensation. There was no further contract with him other than might be found in a resolution adopted severally by the city and county selecting plaintiff's plan. Resting upon the resolution, plaintiff sued for his commission upon the estimated cost of the buildings. In refusing his petition the supreme court, per Woods, justice, said: "The resolution was the voluntary act of the city council and county commissioners. It was not a proposition, but simply the expression of their purpose to build their structure after the plans of the plaintiff, subject to such changes and modifications as might thereafter be determined upon by the common council and the county board. . . . There was no mutuality, no consideration—both of which are essential to a contract": See, also, *Allen v. Bowman*, 7 Mo. App. 29. Compare *Hall v. Los Angeles County*, 74 Cal. 502; *Driscoll v. Independent School Dist.*, 61 Iowa, 426; *Walsh v. St. Louis Exposition*, 101 Mo. 534; *Edge Moor Bridge Works v. Bristol*, 170 Mass. 528.

THOMPSON v. LOWELL, LAWRENCE, AND HAVERHILL
STREET RAILWAY COMPANY.

[170 MASSACHUSETTS, 577.]

INDEPENDENT CONTRACTOR—LIABILITY FOR.—One who employs an independent contractor to make and conduct an exhibition is not relieved from responsibility to persons receiving injury, if the exhibition is of a kind which will probably cause injury to spectators unless due precautions are taken to guard against harm.

A STREET RAILWAY CORPORATION WHICH MAINTAINS A PLACE ON THE LINE OF ITS ROAD for exhibitions, advertising them on its cars and admitting its patrons free, and employing a manager to furnish and maintain exhibitions and entertainments, is answerable to a spectator receiving injury while attending an exhibition, if it is in its nature such that it will necessarily or probably cause injury to persons present unless guarded against, and the railway corporation fails to exercise due care to prevent harm. Therefore, if the exhibition is of marksmanship, and a spectator is hit in the eye by a fragment of a bullet or other metallic substance flying from an impact wherein the bullet hits the butt, the sufferer may recover, if the evidence tends to show that the accident happened from a cause which might have been prevented and which ought to have been foreseen and guarded against by somebody. The spectator cannot be held to have assumed the risk of injury.

Tort for personal injuries claimed to have been sustained from the negligence of the defendant corporation. It was the owner of an electric street railway, and maintained a grove as a pleasure resort on the line of its road. This grove was fitted up as a place for public amusement with certain permanent fixtures, including a pavilion used for band concerts, a large platform or stage, and a number of benches for the accommodation of persons witnessing the exhibitions. The defendant contracted in writing with one Gorman by which he furnished and managed certain attractions for a period of about ten weeks, and the instruments and appliances of these exhibitions, other than the permanent fixtures already mentioned, were furnished by Gorman or by exhibitors employed by him. Among the exhibitions was one by a man born without hands who gave exhibitions of marksmanship. He sat on one side of the stage and shot toward the other, on which rested a butt to receive the bullets, which were fired at various small objects. This butt consisted of a steel plate about a foot square, fastened to a plank, and rested on an iron easel so arranged that the butt inclined slightly away from the performer. The plaintiff attended one of these exhibitions. After the performer had fired a shot and it was heard to strike the butt, the plaintiff felt a pain in his eye and jumped from his seat, and,

putting his hand over his eye, exclaimed that he was hurt, and, on examination, a cut was found on it a third of an inch long, and apparently inflicted by a very thin sharp object, but the examining physician could not testify positively whether there was a foreign body in the eye. It appeared from the examination of the butt that the bullets, in striking it, made thin shavings, and that one of these might have caused the injury suffered by the plaintiff. The trial court was asked to rule that the plaintiff was not entitled to recover; that there was no evidence to show that he was injured by any negligent act of the defendant or its agents; and that the contract between the defendant and Gorman was such that the defendant was not responsible unless the exhibition "was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The trial court, instead of ruling as requested by the defendants, instructed the jury as follows: "The contract between the defendant and Gorman, by virtue of which the latter furnished and managed the exhibition and provided the appliances, was a lawful contract, and the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." Verdict for the plaintiff, and the defendant alleged exceptions.

J. P. Sweeney, for the defendant.

C. A. De Courcy, for the plaintiff.

⁵⁸² ALLEN, J. The Statutes of 1895, chapter 316, authorizes street railway companies to acquire, hold, equip, and maintain real estate to be used for purposes of recreation and for pleasure resorts, the admission being free. By virtue of this statute, the defendant ⁵⁸² maintained such a place on the line of its railway, which contained a large platform or stage for exhibitions. The defendant entered into a written contract with a manager, under which the latter furnished and managed various entertainments there, and amongst them an exhibition of marksmanship by a man born without hands. The defendant paid for advertising these exhibitions, and carried posters on its cars. The plaintiff, having seen an advertisement, was a spectator at the exhibition of marksmanship, having come on one of the defendant's cars. A butt was provided to receive the bullets. All the appliances were furnished by the manager or the per-

former, and nobody in the defendant's employment exercised any supervision or control over the performance. Immediately after a shot had been fired, something struck the plaintiff in the eye. It is not made plain just how the accident occurred, but on the evidence the jury might find that the plaintiff was struck in the eye by a small fragment of a bullet or other metallic substance which flew from the impact when the bullet hit the butt. There was no suggestion that he was not himself in the exercise of due care, or that he was not in a place provided for spectators.

The defendant asked for an instruction to the jury that it "was not responsible unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The judge, instead thereof, instructed the jury that "the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm: *Curtis v. Kiley*, 153 Mass. 123; *Richmond etc. R. R. Co. v. Moore*, 94 Va. 493; *Southern Ohio R. R. Co. v. Morey*, 47 Ohio St. 207; *Hawver v. Whalen*, 49 Ohio St. 69; *Bower v. Peate*, 1 Q. B. Div. 321. The instruction as given was right.

But even under this rule the defendant contends that there was ⁵⁸³ no evidence upon which the jury were justified in finding that the plaintiff was injured by any negligent act or omission on its part; or, in other words, that there was no evidence of any failure on its part to perform its duty in the premises. The question is suggested how far the defendant was bound to go in supervising the instruments and appliances used, and the other details of the exhibition. Should it be held to inspect the rifle and the cartridges, to see if they were safe? Without undertaking to go into unnecessary detail, it is apparent that there was evidence tending to show that the accident happened from a cause which might have been prevented, and that it ought to have been foreseen and guarded against by somebody, either by the defendant or by the manager; and the jury might come to the conclusion that in the general arrangements for an exhibition of this nature the butt should be so placed that fragments which

might fly from the impact of the bullets could not reach the spectators, and that due care was not taken in the arrangement of the stage with reference to possible accidents of this kind, and that the defendant itself failed in its duty in this respect. We cannot say that this was so much a matter of transitory detail that the manager alone was responsible for an omission to pay proper attention to securing the safety of spectators from such a risk. The case, therefore, was rightly submitted to the jury.

Nor can it be held that the plaintiff assumed the risk. He might well rely on those who provided the exhibition and invited him to attend to take due care to make it safe from such an injury as he received.

Exceptions overruled.

INDEPENDENT CONTRACTORS — NEGLIGENCE—LIABILITY.—There is an exception to the general rule that the negligence of an independent contractor is not chargeable to his employer; and this exception exists in the case of statutory duties imposed on individuals or corporations from which they cannot acquire exemption by delegating performance to another, and of contracts for the performance of unlawful acts, or acts which will create a nuisance, or are necessarily attended with danger to others, however skillfully performed: Note to *Smith v. Milwaukee etc. Exchange*, 51 Am. St. Rep. 919; *Omaha v. Jensen*, 35 Neb. 68; 37 Am. St. Rep. 432, and note; *City etc. Ry. Co. v. Moores*, 80 Md. 348; 45 Am. St. Rep. 345; *Dillon v. Hunt*, 105 Mo. 154; 24 Am. St. Rep. 374, and note; monographic note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 204.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

DROVERS' NATIONAL BANK *v.* BLUE.

[110 MICHIGAN, 31.]

TRIAL—CERTIORARI—OBJECTIONS AVAILABLE UPON.—If, after the disagreement and discharge of a jury in an action before a justice of the peace, the parties submit the case to the justice upon the proofs already taken stipulating that all questions shall be saved to the parties, an objection to the exclusion of evidence is available on certiorari.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—BURDEN OF PROOF.—If, in an action on a note by a purchaser thereof, there is proof of fraud in the inception of the note, the burden of proving a bona fide purchase is upon the holder, but, if he in the first place makes a prima facie case of bona fide purchase, evidence of such fraud is not admissible until such prima facie case is attacked by evidence raising a question of fact in relation thereto.

BANKS AND BANKING—BONA FIDE PURCHASER.—A bank which discounts a note for a customer, crediting the proceeds to his account, is not a bona fide purchaser for value, unless such credit is drawn upon or the account of which it becomes a part is exhausted before the maturity of the note, or before notice of fraud invalidating it.

H. M. Dunham, for the appellant.

Sawyer & Bishop, for the appellee.

³¹ **HOOKEE, J.** The plaintiff commenced this action in justice's court, and obtained judgment, which was reversed ³² by the circuit court upon certiorari. It is here upon writ of error.

The case was first tried by a jury, the result being a disagreement. After the discharge of the jury, the parties stipulated in writing that the case might be decided by the justice upon the proofs taken upon the trial, all questions raised upon such trial to be saved to the respective parties, the same as though

the proceedings upon such trial had been repeated before the justice. The stipulation takes the case out from the rule laid down in the case of *Hollenburg v. Shuffert*, 47 Mich. 126.

The action was upon a promissory note executed and delivered by the defendant to the Chicago Supply Company, an Illinois corporation. The plaintiff offered in evidence the note (the execution being admitted), and produced testimony to the effect that it purchased the note before maturity from the Chicago Supply Company in good faith, paying seventy dollars therefor, by crediting the same upon the bank-book of said company, which did banking with the plaintiff. The defendant thereupon offered to show that the note was procured through the fraud of the Chicago Supply Company, but this proof was excluded, on the ground that it must first be shown that the plaintiff was not a bona fide purchaser. Had the plaintiff merely introduced the note, with proof of ownership and amount due, and rested, the testimony offered would have been admissible, under the rule that the burden of showing bona fides is upon the plaintiff when there is testimony showing fraud in the inception of the note: *Little v. Mills*, 98 Mich. 423; *Rice v. Rankans*, 101 Mich. 385. But in this case the plaintiff attempted to show a bona fide holding; and it is manifest that, if it made out a prima facie case of such holding, no amount of evidence of fraud in the inception of the note would be of any avail, until such prima facie case should be attacked by evidence raising a question of fact in relation thereto. And in such case it would be within the discretion of a court to require such evidence before listening to evidence upon ³³ the subject of the inception of the note. If, however, the plaintiff did not make out a prima facie case of such bona fide holding, proof of fraud by the payee in procuring the note would have been a complete defense, until the plaintiff should show a bona fide purchase.

The testimony shows that no money or valuable thing passed at the time of the purchase. A mere credit was given by the bank for the note—a promise to pay, in other words; and there is nothing to show that this credit was ever drawn upon, or that the account of which it became a part was exhausted, before the maturity of the note, or before notice of the fraud. This did not show the bank to be a purchaser for value, within the rule: 1 *Daniel on Negotiable Instruments*, sec. 779 b, and cases cited, viz: *Dresser v. Missouri Construction Co.*, 93 U. S. 92; *Dougherty v. Central Nat. Bank*, 93 Pa. St. 227; 39 Am. Rep. 750; *Lancaster Co. Nat. Bank v. Huver*, 114 Pa. St. 216; *Mann v. Sec-*

ond Nat. Bank, 30 Kan. 412; Fox v. Bank of Kansas City, 30 Kan. 444. The testimony offered was, therefore, erroneously excluded, and the circuit court was right in reversing the judgment of the justice.

The judgment is affirmed.

The other justices concurred.

CERTIORARI — QUESTIONS REVIEWABLE UPON — ADMISSION OR EXCLUSION OF EVIDENCE.—It is a fair summary of the decisions upon this topic to say that in those states in which the evidence may be brought before the superior court upon certiorari, that court may examine it, not for the purpose of determining the credibility of witnesses, or the weight to be given conflicting testimony, but solely for the purpose of determining whether, from competent evidence before it, the decision of the inferior court is sustainable: See monographic note to Wulzen v. Board of Supervisors, 40 Am. St. Rep. 35, on questions reviewable upon certiorari.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—DEFENSE OF FRAUD.—If fraud in the inception of a note is established, it then becomes incumbent upon the plaintiff to prove that the note came to him before maturity, bona fide, and for value: Banks v. McCosker, 82 Md. 518; 51 Am. St. Rep. 478, and note; Grant v. Walsh, 145 N. Y. 502; 45 Am. St. Rep. 626, and note. As to the shifting of the burden of proof in such a case, see monographic note to Bedell v. Herring, 11 Am. St. Rep. 323-326.

NEGOTIABLE INSTRUMENTS—RIGHTS OF PURCHASERS—BANK DISCOUNTING NOTE.—If a bank discounts a note before due, and places the amount to the credit of the payee, this alone will not constitute the bank a bona fide purchaser for value against equities; but if the payee subsequently checks against and exhausts the amount of his credit at the time the note was placed to his account including the amount of the note, before the bank has notice of any equities, it will be considered an innocent purchaser for value: Drelling v. First Nat. Bank, 43 Kan. 197; 19 Am. St. Rep. 126, and note.

MITCHELL v. PRANGE.

[110 MICHIGAN, 78.]

NEGLIGENCE—PLEADING.—A recovery for negligence cannot be had upon a ground not alleged in the declaration.

NEGLIGENCE—WHAT IS NOT.—It is not negligence to fail to refill a trench dug for a sewer before exploding a blast therein. In the absence of evidence showing that that was the proper, or usual, or reasonable thing to do.

NEGLIGENCE — BLASTING — CONSTRUCTION OF CONTRACT.—A provision in a contract for the construction of a sewer, requiring the contractor, when "blasting is necessary, to cover the blast with brush or timber sufficiently to prevent injury to persons or property," is for protection from injury by fragments which

might otherwise be thrown from the sewer trench, and does not reach the case of one injured by a horse frightened by an explosion of a blast.

NEGLIGENCE—BLASTING—NOTICE.—When a business requiring blasting has been conducted for several weeks in the near vicinity of a resident with his knowledge that blasts were of frequent occurrence, it is not negligence to fail to notify such resident of each intended blast.

B. Hoyt, for the appellants.

P. Doran and C. A. Watt, for the appellee.

⁷⁹ **HOOKE**R, J. The plaintiff was injured by the kick of a horse which he was shoeing, and recovered a judgment against the defendants, who were engaged in excavating a trench for a sewer, some hundreds of feet distant from his shop. The plaintiff's claim is, that the horse was frightened by an explosion in the trench, caused by the defendants for the purpose of excavating rock. Counsel for the plaintiff admitted upon the trial that blasting was necessary. The first count of the declaration alleges the explosion as wrongful; the second alleges that it was the duty of the defendants to give notice, by ringing a bell or otherwise, to people in the vicinity, that a blast was to be made, which duty was neglected. Upon the trial it was claimed that defendants' negligence consisted in using an excessive charge, in failing to properly cover it, and in failing to give the proper notice of the intended blast; and the case was allowed to go to the jury upon such theories.

It was improper to allow the jury to find a verdict upon the ground that the charge was excessive, or that it was ⁸⁰ not properly covered, as neither was alleged in the declaration. Furthermore, there was no evidence that the charge was an improper one, or that any usual method of covering would have obviated the danger. It was urged that filling the trench with dirt would have lessened the noise, but it was not shown to be a proper or usual or reasonable thing to do, to excavate and refill a trench each time they put in and explode a blast. The specifications under which the work was done required that: "When rock is found in the bottom of a trench, it is to be taken out to a depth of six inches below the bottom of the sewer, and replaced by strong gravel, well rammed. Ledge rock, that cannot be removed by pick or bar, will be paid for as extra work at a price named in the proposal for such excavation. Should the contractor fail to name a price for such rock excavation, no extra allowance will be made therefor. The estimate of the quantity of rock excavated will be based upon the bottom width of trench

required for laying the different dimensions of sewers, as used in the original estimate of quantity of excavation, with side slopes of one-fourth of a foot horizontal to one foot vertical. In all cases where blasting is necessary, the blast is to be carefully covered with brush or timber sufficient to effectually prevent injury to persons or property."

The provision for covering was evidently to protect persons and property from injury by fragments which might otherwise be thrown from the trench, and it was error to instruct the jury as follows: "The contract with the city requires that, in all cases where blasting is necessary, the blast is to be carefully covered with brush or timber, sufficiently to effectually prevent injury to persons or property. Now, was this blast so carefully covered with brush or timber as to sufficiently and effectually prevent injury to persons or property; or, in other words, did these defendants use all the precaution, notices, and warnings, and cover that blast of dynamite in such a manner, as prudent men ought, under like circumstances, to have exercised, is a question for you to determine."

⁸¹ Nor do we think the defendants negligent in not taking measures to apprise the plaintiff of the intended blast. It appears that they did take precautions to warn passersby within a reasonable distance, but it would hardly be reasonable to expect them to give notice to everyone who resided or worked within a radius of five hundred feet, especially after the business had been going on, to the knowledge of such persons, for several weeks. The plaintiff knew that blasting was a common occurrence, and to be expected at any minute. This did not deter him from attempting to shoe the horse. He did not know when the blast was coming, and, if the defendants knew that he had a blacksmith shop in the vicinity, they did not know that he would have the foot of a spirited horse in his lap. Both were engaged in lawful acts, and upon this record the injury appears to be a casualty, which is not ascribable to the defendants' neglect of duty.

Judgment reversed, and a new trial ordered.

Grant, Montgomery, and Moore, JJ., concurred.

Long, C. J., did not sit.

NEGLIGENCE — BLASTING — DUTY OF THOSE ENGAGED IN.—Persons engaged in blasting are bound to give notice to all persons about to pass within the limits of possible danger at the time of firing the blast: *Driscoll v. Newark etc. Cement Co.*, 37 N. Y. 637;

97 Am. Dec. 761. They are charged with knowledge of any fact in reference to the actual effect of the explosive used that they could by reasonable diligence have ascertained. They are also charged with the duty to adopt some means to protect persons placed in danger by the explosion of such blasts, and a failure to perform this duty is negligence for which they are liable in damages: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786, and note. When injuries are inflicted by exploding a blast of gunpowder in a thickly settled part of a city, the parties causing such explosion are not relieved from liability by the fact that they employed careful and experienced men, and exercised the highest degree of care: *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248. See *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936, and note.

SAFFORD v. DETROIT BOARD OF HEALTH.

[110 MICHIGAN, 81.]

APPELLATE PRACTICE—WAIVER OF OBJECTIONS.—

If an issue is framed, and a case presented upon its merits, an objection to the irregularity of the proceedings cannot be raised for the first time on appeal.

BOARDS OF HEALTH—POWERS AND LIABILITIES—

QUARANTINE.—A statute providing that the board of health of a municipality shall, in case of pestilence or epidemic disease, "take such measures and do, and order, and cause to be done, such acts, for the preservation of the public health, as they may in good faith deem the public safety and health to demand," makes it the duty of such board to award compensation for direct damages growing out of the action of the board in using a hotel for a hospital during an epidemic of smallpox therein, and in destroying infected property, and in causing the burial of smallpox patients.

MANDAMUS — BOARDS OF HEALTH.—Mandamus is the proper remedy to compel a board of health to perform its duty in awarding compensation for damages to private property arising from its official action.

F. A. Baker and G. Gartner, for the relator.

J. J. Speed and D. E. Heineman, for the respondent.

⁸² MOORE, J. The respondent in this case asks for a review by certiorari of the proceedings had in the Wayne circuit court, in which respondent was compelled by mandamus to audit and allow a certain claim in favor of relator. Relator was the proprietor of the Merchants' Hotel, in the city of Detroit. June 1, 1894, Louisa Leonard, a servant in his employ, was taken ill. Her disease was pronounced measles by Dr. Cleland. As the young woman failed to improve, Safford telephoned the board of health that he feared the case was smallpox. In reply, one Goodson, contagious disease clerk at the health office, said: "It

is all right; only a case of ⁸³ measles. Don't be alarmed. And it would be best for you to carry out Dr. Cleland's orders." June 6th the girl died. An investigation was made by the health department, and the case pronounced smallpox. The officers of the board of health immediately took possession of the Merchants' Hotel, and placed it in quarantine; confining therein thirteen persons, several of whom were subsequently stricken with smallpox, and detained in the hotel, and there treated, by the board of health. The quarantine continued until June 29th. After this the board of health disinfected the premises, and destroyed a considerable portion of the furniture which had become infected. September 29th relator presented a claim to the board of health, asking for compensation for the use of the hotel as an hospital, for damaged and destroyed property, and for damage to his business through respondent's neglect to remove the patients to some other place for treatment, thereby causing him to lose his business. The entire amount of this claim, which was disallowed in toto, was six thousand one hundred and six dollars and seventy-five cents.

Upon relator's petition, an order to show cause was granted. Respondent answered, and issue was framed thereupon by several pleas put in by relator to such answer. The fourth and fifth pleas set up new matter from that in the petition, in which the action of the board of health is rendered subject to criticism. These pleas aver that respondent was negligent in the Leonard case, and needlessly allowed several persons to become exposed, many of whom were subsequently stricken with smallpox, two dying; that if Miss Leonard had been promptly removed, it would not have been necessary to quarantine the hotel; that after the hotel was quarantined, no person was allowed to go in or out for a period of nine days; that relator, his wife, and eleven other persons were confined without any medical attendance whatever, and without any attention on the part of the board of health. The jury rendered a special verdict of direct damages for relator, and judgment was entered in the sum of nine hundred and eighty-one dollars and seventy cents, including ⁸⁴ costs taxed at ninety dollars and twenty cents. Relator asked for a new trial, which was denied, and the case comes here, as previously stated.

The proceeding in the court below was a somewhat unusual one, but no objection was made by counsel for respondent to the manner of framing the issue, and the case was presented upon its merits; so that the objection to the irregularity of the

proceedings, now raised for the first time, must be treated as waived.

For the purposes of this case, I think the verdict of the jury may, with much propriety, be treated as advisory to the court, inasmuch as he listened to all the testimony, and found, in his written opinion, the facts to be as stated by the jury. The claim of Mr. Safford for consequential damages was rejected. The amount of the judgment was for direct damages growing out of the action of the board of health in using the hotel for an hospital, the destruction of the infected property, and the burial of Miss Leonard, who died of smallpox. The question involved is whether, under the law and the facts, the respondent is liable. Its contention is, that what was done by it was necessary, in the interest of the public welfare, and that the loss must be borne by Mr. Safford. It is the claim of the relator that the board of health of the city of Detroit stands in the same relation to the city that the township board of health does to the township, and that it has like duties and powers in cases of contagious diseases, and that the statute provides for compensation when property is occupied or destroyed to prevent the spread of such diseases.

Section 11, act No. 403 of the local acts of 1893, provides that: "In case of pestilence or epidemic disease, . . . it shall be the duty of the board of health to take such measures, . . . and to do and order and cause to be done such acts, for the preservation of the public health, though not herein or elsewhere or otherwise authorized, as they may in good faith deem the public safety and health to demand."

⁸⁵ The next section provides that the common council and board of estimates shall provide a fund for the maintenance of the board of health in performing the duties and obligations imposed by law on the board, and makes the city treasurer the treasurer of the health board. It is claimed that, whether or not the county of Wayne should eventually be liable to pay these expenses, the account must first be presented to, and acted upon by, the board of health, in order to fix the amount of the liability.

The general law confers upon township boards of health large powers in the treatment of contagious diseases: See 1 Howell's Statutes, c. 39. Section 1647 makes it incumbent on the board of health to make provision for the care of a sick or infected person "by providing nurses and other assistance and necessities, which shall be at the charge of the person himself . . . if able, otherwise at the charge of the county to which he belongs."

In construing this section, the courts have held that a city may make itself liable: *Rae v. Flint*, 51 Mich. 526. They have also held that a township may make itself liable: *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63. It has also been held, in construing this section, "that the destruction of the infected property used in the care of the sick is so plain a necessity as to need no discussion": *Elliott v. Kalkaska County Supervisors*, 58 Mich. 452; 55 Am. Rep. 706. In the last-mentioned case, Justice Campbell said: "The exigency of a pestilence will not wait for the convenience of parties, and measures must be prompt and effectual. The board of health must have power to make necessary contracts, and this involves all their terms": Citing *People v. Supervisors*, 3 Mich. 475.

In the case at issue, it is clearly established that the relator acted in good faith, as did the board of health. We think it is within the contemplation of the law that, when property is used or destroyed or services rendered under such circumstances as in this case, compensation should follow. We also think it the duty of the board of ⁸⁶ health to pass upon the question of the amount of compensation, and, where they refuse utterly to award compensation, that a writ of mandamus may be invoked to compel them to do so.

The judgment is affirmed, with costs.

Grant, Montgomery, and Hooker, JJ., concurred.

Long, C. J., did not sit.

APPEAL—TRIAL ON MERITS—OBJECTION NOT RAISED BELOW.—He who goes to trial on the merits without objection to defects in the proceedings of the lower court thereby waives the right to raise such objection on appeal: *Birmingham Loan etc. Co. v. First Nat. Bank*, 100 Ala. 249; 46 Am. St. Rep. 45. It is a general rule that objections not raised at the trial will not be first considered on appeal: *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560; *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

BOARDS OF HEALTH—POWERS UNDER STATUTE.—A statute creating a state board of health, and giving it general supervision over the health and lives of citizens, is to be construed with reference to the specific duties imposed and powers conferred upon the board by the act taken as a whole: *Potts v. Breen*, 167 Ill. 67; 59 Am. St. Rep. 262. Where health officers of a city are empowered to remove persons infected with smallpox, and helpless, to a pest-house, they have implied authority to employ nurses for them at the expense of the city: *Labrie v. Manchester*, 59 N. H. 120; 47 Am. Rep. 179; *Elliott v. Kalkaska Supervisors*, 58 Mich. 452; 55 Am. Rep. 706. As to their power to take possession of private houses for the purpose of fighting contagious diseases, see monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 548.

MATTHEWS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[110 MICHIGAN, 170.]

ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—

An owner of the fee, who incloses a railroad right of way with his adjoining land and uses it continuously without the consent of the company, asserts an ownership inconsistent with its rights, and has such an occupancy as ripens into title by adverse possession upon the expiration of the statutory period, although he has a right during such period to use the right of way for any purpose not required for the purposes of the railroad.

C. E. Weaver, I. R. Grosvenor, G. C. Greene, and O. G. Getzen-Danner, for the appellant.

Landon & Lockwood, for the appellee.

¹⁷¹ MONTGOMERY, J. In July, 1871, the predecessor of the defendant company obtained a right of way for a railway, one hundred feet in width, being fifty feet on each side of the surveyed line, extending through the land upon which the village of Carleton is now situated. In October, 1872, Charles A. Kent conveyed to the railway company and its successors the right to enter upon and conduct, maintain, and operate its railroad and appurtenances in and upon a strip fifty feet in width, lying south of the first-named one hundred foot strip. Subsequently, and on the 7th of April, 1875, Kent conveyed forty acres of land to the plaintiff, which included the lands the right of way over which was last deeded to the railroad company. This deed was a quitclaim, and was recorded April 10, 1875. During the summer of 1874 the railroad company built a fence on the south side of the first one hundred foot strip, past the land in question. In November, 1876, the plaintiff inclosed all the land south of the fence with the remaining portion of his forty, and has since continued to use the land for crops, grass, and pasturage, until the time of the alleged trespass. The defendant, in 1894, extended the fence so as to include the fifty feet south of the first right of way, being parcel of the forty acres deeded to the plaintiff. The plaintiff thereupon brought this action of trespass. On the trial it appeared that the plaintiff had occupied the lands, as above stated, for more than fifteen years, without any assent by the railway company. The circuit judge instructed the jury that the plaintiff had acquired title by adverse possession. The defendant brings error, and contends that the occupancy of the plaintiff was not such as to ripen into a title, for the

reason that the plaintiff had the right to occupy the land, and use it for ¹⁷² any purpose, as long as its use was not deemed necessary by the railway company.

The precise question involved was recently determined by the supreme court of Illinois in the case of Illinois Cent. R. R. Co. v. O'Connor, 154 Ill. 550. The court say in that case: "For more than thirty years it [the railroad company] abandoned all the use of the land, fenced it out of its right of way, and allowed it to remain in the exclusive possession and use of the owner of the fee. When it desired to use it, it attempted to exclude the owner of the servient estate from the same. It is not denied that, if the controversy between these parties had been as to the ownership of the fee simple title to the premises, plaintiff's possession would have been a complete bar; and we are at a loss to perceive how, under the facts of the case, it is less so as against the claim to a mere easement."

We think this decision is in harmony with the previous rulings of this court, in which it has been determined that the owner of abutting land may acquire title good as against the public, by an occupancy for the statutory period: See Gregory v. Knight, 50 Mich. 61; Coleman v. Flint etc. R. R. Co., 64 Mich. 160; Big Rapids v. Comstock, 65 Mich. 78.

We recognize the doctrine contended for by defendant's counsel to the extent that, if the use of the owner of the servient estate be consistent with its use for an existing easement, the owner of the servient estate cannot acquire title by such possession; and it is not to be denied that there are cases which fully sustain the contention of defendant's counsel. These cases originated with the case of Union Pac. Ry. Co. v. Kindred, 43 Kan. 134, where, upon facts very similar to those in this case, it was held that title was not acquired by the owner of abutting property who fenced in a portion of the right of way with his own land, and used it for the statutory period. This case was followed by the supreme court of Tennessee in East Tennessee etc. Ry. Co. v. Telford, 89 ¹⁷³ Tenn. 293, and a similar holding was made in Slocumb v. Chicago etc. Ry. Co., 57 Iowa, 675. It is to be noted that, in the case of Union Pac. Ry. Co. v. Kindred, 43 Kan. 134, the court relies for authority sustaining its position, in part, upon McClelland v. Miller, 28 Ohio St. 488, which was a highway case, and inconsistent with the cases cited above from our own reports.

We think the use of this strip of land by the plaintiff must be held to have been wholly inconsistent with the right of the

railway company. Certainly the defendant could not at any time have occupied the land for its purposes while it was thus inclosed by the plaintiff. This being the case, we think the occupancy of the plaintiff amounted to an assertion of ownership inconsistent with the defendant's claim, and was such an occupancy as has ripened into title by adverse possession.

The judgment is affirmed.

The other justices concurred.

ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—A deed of a strip of land for the purpose of constructing, maintaining, and operating a railroad track thereon, conveys a right of possession exclusive and wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns, for the purposes of grazing or agriculture, or as a part of the farm to which it originally belonged, although it may not convey an estate in fee. And if such grantor and his assigns continue to use and occupy a portion of such strip of land as they use the residue of the farm, claiming to be the owners thereof, their possession is adverse, and if continued for twenty years will bar the grantee's right to bring an action for its recovery: *Illinois Cent. R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581. Compare *Schwallback v. Chicago etc. R. R. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740. On the general subject of adverse possession, see monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162.

ACKENHAUSEN v. PEOPLE'S SAVINGS BANK.

[110 MICH'GAN, 175.]

BANKS AND BANKING—PAYMENT TO FORGER—LIABILITY TO DEPOSITOR.—If a savings bank is organized under a general statute, and the profits of the bank belong to its stockholders and not to depositors, a by-law providing that the bank shall not be liable to a depositor for payment made to a third person who presents a depositor's pass-book, however acquired, does not relieve the bank from liability imposed upon it by such statute to repay all deposits to the depositor, or his legal representatives, in a case where a pass-book is presented by, and a deposit paid to a third person, who has forged the depositor's signature, unless the attention of such depositor has been expressly called to such by-law, and he has actually or impliedly assented thereto.

BANKS AND BANKING—BY-LAWS.—The requirements of a general statute, under which a savings bank is organized, that all deposits shall be paid to the depositor or his legal representatives, cannot be changed by a by-law adopted by the bank, unless the attention of the depositor is called thereto, and he actually or impliedly assents.

W. L. January and C. C. Stewart, for the appellant.

Keena & Lightner, for the appellee.

¹⁷⁵ MOORE, J. The plaintiff came from Germany to Detroit in December, 1893. On the steamer he made the acquaintance of one Lange, and they came on to Detroit together, and plaintiff roomed and boarded with Lange and his family. Both Lange and plaintiff spoke the English language a little. Plaintiff had a thousand dollars ¹⁷⁶ in money that he desired to put where it would be safe, and was advised to deposit it in the defendant bank, which he did, Lange going with him when he made the deposit. The bank has a large deposit account and a large number of depositors. Plaintiff had never deposited money before. At the request of the clerk to whom he paid the money, he wrote his name in a book, so the bank could have his signature. The bank gave to the plaintiff a deposit-book, containing printed by-laws, reading as follows:

"3. On making the first deposit, the depositor shall sign his or her name in the signature-book of the institution, which contains a copy of these rules and regulations, and to which the depositor will assent before his or her deposit can be received by this institution."

"7. Money deposited in this institution will be entered in a book which will be given to each depositor. This small book will be the depositor's voucher, or evidence of his or her deposit in the institution. When money is withdrawn, this book given to the depositor shall be brought in to the bank, to have the payments entered therein. Depositors can draw money themselves, or, in case of absence or sickness, it will be paid to their order, properly witnessed, and accompanied by the book."

"10. While the officers of this institution will do their utmost to prevent fraud, yet, as they will be unable to identify every depositor, this institution will not be responsible for loss sustained when a book has been mislaid, stolen, or lost, if, before the cashier is notified thereof, such book be paid in whole or in part on being presented.

"11. If a book be mislaid, stolen, or lost, the owner is required to give immediate notice of the fact to the cashier of this institution."

There is nothing to indicate that plaintiff's attention was called especially to these by-laws, or that he even read them. The plaintiff left his deposit-book in his room at Lange's house, and went to Cleveland. While in Cleveland, plaintiff got five hundred dollars from Lange. Seven days after the deposit was made, the deposit-book was presented at the bank, and the entire one thousand dollars was withdrawn. It was admitted in

court that this was done by Lange, and ¹⁷⁷ that he forged the plaintiff's signature. The trial court instructed the jury that: "The five hundred dollars paid by Lange to Ackenhausen must be treated as a payment. Lange took his money to the amount of a thousand dollars. Lange had advanced him five hundred dollars. To hold any other way than that would permit the plaintiff in this suit to get fifteen hundred dollars, and to take five hundred of this thousand dollars to Lange, and pay back to him. To avoid circuitry of action, I make one lawsuit take the place of three lawsuits, and I charge you, as a matter of law, that that five hundred dollar payment should be allowed under any circumstances. Now, for the purpose of this case, the only question for you to consider is this: Did Lange, in getting this money, act under an authority from the plaintiff? If you find that Ackenhausen gave Lange authority to draw the deposit from the bank, and the bank paid it to Lange upon presentation of the book, the plaintiff is not entitled to recover. It is not necessary that such authority to draw the money should be in writing. A verbal authority accompanied by delivery of the book to Lange, would be sufficient to authorize Lange to sign Ackenhausen's name to the order, surrendering the book, and receiving the money. But I charge you that, if he did not have authority, then you are to render a verdict for the plaintiff. So that is the only question in the case: Did Lange have authority or didn't he? If he did, your verdict should be for the defendant; if he did not, your verdict should be for the plaintiff. But for the purpose of this case I charge you that one who impersonates a depositor without his knowledge, and signs such depositor's name on the check or receipt, is not such depositor's representative, even though he may at such time present to the bank such depositor's bank-book. If the money which was deposited by plaintiff in this case was paid out by the bank to one Lange, without authority of the plaintiff, then the defendant is liable in this action. If you come to the conclusion that this was paid without authority, then you will render a verdict for the plaintiff. The amount of that verdict will be five hundred dollars, with interest from the time of this demand, which would be from the 24th of February, 1894, at six per cent.

"Now, there are two special questions which I will ¹⁷⁸ submit to you: 1. Was the money deposited by plaintiff in defendant bank drawn by his authority? That is the question which is to control your general verdict, as I have already indicated. You will answer that 'Yes' or 'No,' according as you believe the truth

to be. 2. Was the money deposited by plaintiff in defendant bank negligently paid out by defendant's teller? That I instruct you to answer 'No.' This is a formal matter to get this question and the answer on record, so that you will answer that as I have instructed you."

The jury rendered a verdict in favor of plaintiff for five hundred and thirty-five dollars, and answered special question 1 "No," and special question 2 "No," as instructed by the court. The court entered judgment for defendant non obstante verdicto, and the plaintiff appeals.

A good many assignments of error have been taken, but those necessary to be considered relate to the effect of the by-laws upon the parties. It is claimed by the defendant that the deposit of the money, the issuing of the deposit-book with its copy of the by-laws, and its acceptance by the plaintiff, and his signature, were all parts of one transaction, which resulted in a contract by which the bank was relieved from any further liability under the circumstances of this case. The counsel for the bank call the attention of the court to the following sections of the statute: Section 26 of the banking law (Pub. Acts 1887, p. 233) provides that savings banks shall have power to receive deposits, and says: "All deposits in said banks shall be repaid to the depositors, or his or her lawful representatives, when required, at such time or times, and with such interest and under such regulations, as the board of directors of the bank from time to time prescribes, which regulations shall be printed, and conspicuously exposed in some place accessible and visible to all in the business office of said bank."

Section 28 provides: "A pass-book shall be issued to each depositor in the savings department, containing the rules and regulations ¹⁷⁹ adopted by the board of directors governing such deposits, in which book shall be entered each deposit made by, and each payment made to, such depositor; and no payment or check against any such savings account shall be made unless accompanied by and entered in the pass-book issued therefor, except for good cause, and on assurances satisfactory to the officers of the bank."

It is insisted that the bank complied with these provisions of the statute, and that plaintiff, because of his contract with the bank, has no cause of action against it: Citing *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Sullivan v. Lewiston Inst.*, 56 Me. 507; 96 Am. Dec. 500; *Goldrick v. Bristol Co. Sav. Bank*, 123 Mass.

320. The cases just cited undoubtedly hold that under the laws of the states where the decisions were rendered, and the by-laws in force in those banks, there was no liability; and, if the savings banks which were parties to the litigation involved in those cases were created under like laws, and possessed with the same powers as savings banks possess in this state, the decisions would be conclusive. Until recently the primary idea of a saving bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security. They were without capital and managed by trustees. The banks themselves derived no benefit whatever from any deposits or the produce thereof: *Huntington v. Savings Bank*, 96 U. S. 395. An examination of the statutes of Maine, Massachusetts, and New York at the time the decisions cited by the counsel were rendered will disclose the fact that the savings banks mentioned therein were created and managed for the benefit of the depositors. They were managed by trustees, and, after deducting the expenses of the management of the business, the depositors were entitled to the profits; so that every depositor was directly interested in having the losses as small as possible. It will also appear that there ¹⁸⁰ was no statute requiring the deposits, with interest, to be paid to the depositor or his legal representative. In this state, savings banks like the defendant bank are organized under the general banking law. They are required to have a capital stock and stockholders. The depositors have no share in the profits of the business beyond the interest paid on their deposits; the profits of the business all belong to the stockholders. The conditions surrounding the two systems of banking are so unlike that the decisions under one system are not likely to be controlling when litigation arises under the other system. It may well be argued that, if the depositors are to share in the profits of the business when it is profitable, they shall accept its losses without complaining, and not seek to hold the bank liable. On the other hand, if the bank is to take the profits of the business, where is the justice of asking the depositor to take the risks?

In 2 *Morse on Banks and Banking*, third edition, section 617, it is stated of a savings bank: "The depositors are the bank. The trustees and officers are their agents for receiving and loaning their money, and the profits belong to the depositors." In the following section it is stated: "Although a bank may be called

a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing; and in such a bank a deposit creates the relation of debtor and creditor": *Ward v. Johnson*, 95 Ill. 241.

It would logically follow that if the depositors are the bank, and the trustees and officers are the agents of the depositors, any regulation or by-law adopted by the agent would bind the principal—that is, the depositors—and they would be bound by it. On the other hand, if the relation between the bank and the depositor is that of debtor and creditor, the general rule would apply that the by-laws of a corporation are binding upon none but its members and officers: *Angell and Ames on Corporations*, sec. 359.

¹⁸¹ In this state the officers of the bank are the agents of the bank, and not the agents of the depositors. A by-law passed by them is a by-law of the bank, and not of the depositor, and if the effect of it is to change the relation of the creditor to the debtor so as to relieve the obligation of the debtor to the creditor, must not the creditor have his attention called to the by-law in such a way that he shall understand its effect before he shall be bound by it? In *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 166, Justice Campbell said: "The contract of a depositor with his banker does not differ in any material way from any other contract whereby one person becomes bound to take charge of and repay another's funds. As between banker and depositor, there can be no doubt that the bank will be protected in paying out money in such way and on such terms as the depositor has authorized. And, on the other hand, . . . the contracting party can lawfully control his own funds until he has disposed of them. . . . The bank-book is no contract, and is only one of the means of indicating the state of the funds. . . . The money belonging to one person cannot cease to belong to him until he does some act to dispose of it": See *Burnett v. First Nat. Bank*, 38 Mich. 634.

It was held in *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 60, 54 Am. Rep. 653, where a savings bank sought to justify the payment by it of a depositor's money to a stranger upon the ground that such payments were made to a person having possession of the depositor's pass-book, that: "Such pass-book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such time and in such manner as he shall direct. This contract is implied from the nature and objects of the transaction occurring between the parties. The de-

positor may, by special contract, authorize payments to be made in some other manner than by his directions; but, in order to make such payments a protection to the bank, it is necessary for it to show some ¹⁸²² special agreement with the customer, authorizing such a mode of payment."

Then follows an interesting discussion of the effect of by-laws, which it is not necessary to repeat here, as we have indicated that the status of savings banks in the state of New York is quite different from the status of the savings banks of this state.

We think the requirement of the statute that the deposits shall be paid to the depositor or his legal representatives cannot be changed by a by-law, unless the attention of the depositor is called to the by-law, and he assents thereto, actually or impliedly. We think it was error in the learned trial judge to render a judgment for the defendant, and that he should have rendered a judgment in favor of the plaintiff upon the verdict of the jury, and for the amount thereof.

The judgment is reversed, and case remanded, with directions to enter judgment upon the verdict.

Grant, Montgomery, and Hooker, JJ., concurred.

Long, C. J., did not sit.

BANKS AND BANKING—SAVINGS BANKS—BY-LAWS—PAYMENT OF DEPOSIT TO FORGER.—Mere presentation of a pass-book is not authority for the payment of money, in the absence of any agreement to that effect: *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58; 54 Am. Rep. 653; *Eaves v. People's Sav. Bank*, 27 Conn. 229; 71 Am. Dec. 59. But a bank by-law providing that the bank will not be liable for loss sustained when a depositor has not given notice that his deposit-book has been lost or stolen, and the deposit is paid in part or in full on presentation of such book, is a reasonable and proper regulation for the protection of the bank: *Gifford v. Rutland Sav. Bank*, 63 Vt. 108; 25 Am. St. Rep. 744, and note. A depositor must have knowledge of, and actually or impliedly assent to by-laws in order to be bound by them: *Wells v. Black*, 117 Cal. 157; 59 Am. St. Rep. 162, and note; and stipulations between a savings bank and depositor that a deposit may be paid to any one presenting his book does not excuse the bank from the exercise of reasonable care: *Kimball v. Norton*, 59 N. H. 1; 47 Am. Rep. 171, and extended note; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108; 25 Am. St. Rep. 744. Payment to a person presenting a forged order and bank-book of a depositor is no defense to an action brought by a depositor to recover from the bank the amount so paid by it: *Eaves v. People's Sav. Bank*, 27 Conn. 229; 71 Am. Dec. 59, and note.

MEYERS v. HINDS.

[110 MICHIGAN, 300.]

BICYCLES—NEGLIGENCE OF RIDER.—A bicycle is a vehicle, and if a bicyclist passes a pedestrian on the same road going in the same direction, the bicyclist is liable for damage resulting to the pedestrian from a collision between them, provided the pedestrian is without fault.

EVIDENCE.—WHAT WITNESSES THINK IS NOT CONCLUSIVE of the fact, unless no other reasonable basis than the one given exists for the existence of such thought or belief.

BICYCLIST—NEGLIGENCE OF.—One riding a bicycle down a narrow path at the rate of five or six miles an hour without giving warning of his approach when the path is occupied by many pedestrians going in the same direction, is guilty of negligence, and not relieved from liability for running into a pedestrian by the fact that the collision occurred from the bicyclist striking an obstacle, which it is not shown that he could not have avoided in the exercise of due and reasonable care.

BICYCLES—NEGLIGENCE—BURDEN OF PROOF.—If one riding upon a bicycle comes up behind another, who is walking where he has a right to walk, and is unconscious of the approach of the bicyclist, who, without giving any warning, strikes him with his vehicle, those facts, unexplained, tend to show negligence, and cast the burden of proof upon the bicyclist to show that he was in the exercise of due care.

Action to recover damages for injury sustained by a collision with a bicycle. Plaintiff, a girl fourteen years of age, was returning from a picnic in the country, at the time of the accident. She was walking down hill with a child in her arms in a path only wide enough for two persons to walk abreast. The defendant was riding a bicycle down the same hill in the same path, and, without giving any warning of his approach, came up behind the plaintiff, striking her, knocking her down, and inflicting a severe injury upon her. Judgment for the defendant, and plaintiff appealed.

A. A. Ellis, for the appellant.

McGarry & Nichols, for the appellee.

³⁰² GRANT, J. We think the court was in error, and that the plaintiff's evidence entitled her to go to the jury. A bicycle is a vehicle. Counsel for the defendant concede this, and the authorities so hold: *Holland v. Bartch*, 120 Ind. 46; 16 Am. St. Rep. 307; *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76; *Taylor v. Goodwin L. R.*, 4 Q. B. Div. 228. The question, therefore, is: What was the duty of the defendant, riding on a vehicle, in passing a pedestrian going in the same direction? His vehicle made no noise, and he gave no signal. Many others were walking

in this narrow path. The roadbed for vehicles was open to him. If it be granted that he struck a stone or other obstruction, was the stone or obstruction such that he ought, in the exercise of due care, to have seen it, and avoided the danger? Was it such that the consequence of striking it must have been apparent to him? What efforts did he make to avoid the obstruction, if he saw it? When one passes another, both using bicycles and going in the same direction, it appears to be the rule that the one passing is liable if damage results without misconduct on the part of the one passed. Elliott says: "The only rule of general application that can be laid down is, that he who attempts to pass another going in the same direction must do so in such manner as may be most convenient under the circumstances of the case; and, if damage result to the person passed, the former must answer for it, unless the latter, by his own recklessness ³⁰³ or carelessness, brought the disaster upon himself": Elliott on Roads and Streets, 621, 622. See, also, Angell on Highways, sec. 340, Knowles v. Crampton, 55 Conn. 336.

We think the court was in error in holding that the collision was caused by defendant's running over an obstacle. As already shown, the only testimony upon this point was the statement of defendant, made just after the accident, and the testimony of one witness that she thought he struck something; but she based this thought only upon the noise she heard. His own statement, made after the accident, is not evidence of the fact; it is hearsay. What the witness thought is not conclusive of the fact, unless no other reasonable basis exists for her thoughts or belief than the one she gave. But, even if this were so, it would not follow that defendant was relieved from liability unless the obstruction was such that he could not see and avoid it by the exercise of due care. Nor do we think it can be held as the law that the defendant was in the exercise of due care in riding down this narrow path at the rate of five or six miles an hour, occupied, as it was, by many other persons going in the same direction. This is not a case for the application of the rule of law that an accident and a consequent injury are not of themselves evidence of negligence. When one upon a bicycle comes up behind another, who is unconscious of his approach, and is walking where he has a right to walk, gives no warning, and strikes him with his vehicle, these circumstances, unexplained, tend to show negligence. The defendant may be able to show that he was in the exercise of due care, but the burden of proof was cast upon him by the plaintiff's case.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.

NEGLIGENCE OF BICYCLIST—INJURY OF PERSONS ON HIGHWAY.—A person riding a bicycle upon a highway has been treated by the weight of authority as possessing the same rights, and as subject to the same duties, as persons using other vehicles: Note to *Robertson v. Pennsylvania R. R. Co.*, 57 Am. St. Rep. 621. A person cannot be held liable for his acts unless done in such manner and at such time as to show that he is acting in disregard of the rights of others. This rule applies to a bicycle rider lawfully traveling upon a public highway: *Thompson v. Dodge*, 58 Minn. 555; 49 Am. St. Rep. 533. The act of a person in riding his bicycle against a pedestrian upon a town sidewalk, in such a rude and reckless manner as to show a disregard of consequences, is an actionable assault and battery, the intent being implied from the act: *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76; and a person riding a bicycle on a highway at such a speed as to endanger the lives or limbs of passers-by may be convicted of furiously driving a carriage under the English statute: See monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 378.

EVIDENCE—OPINIONS OF WITNESSES.—Conclusions or suppositions of a witness are not, as a general rule, evidence against another person: *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. Such evidence is not received where all the facts upon which it is founded can be ascertained and made intelligible to the court or jury: *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Otis v. Thom*, 23 Ala. 469; 58 Am. Dec. 303, and note. See, also, extended notes to *Baltimore etc. Turnpike Co. v. Cassell*, 59 Am. Rep. 176-186; *Commonwealth v. Sturtivant*, 19 Am. Rep. 410-412.

CHASE v. DARBY.

[110 MICHIGAN, 314.]

ANNUITIES—APPORTIONMENT.—An annuity to be paid by a son to his father cannot be apportioned, and, in the event of the death of the annuitant before the time for making a payment, no part of the annuity can be recovered, although the annuitant was in debt at the time of his death.

V. H. Smith, for the appellant.

R. A. Hawley, for the appellee.

315 *HOOKE*, J. Charles Darby, being the owner of one hundred and sixty acres of land, conveyed the same by deed to his son Charles F. Darby on May 29, 1879, upon the promise of the latter to pay to his brothers and sisters the sum of twelve hundred dollars; and, as a further consideration for the conveyance, he gave to his father a mortgage to secure the performance of an agreement to which it was collateral, which reads as follows:

³¹⁶ "For value received, I promise to pay Charles Darby an annual annuity of three hundred and eighty-four dollars, to be paid in each and every year as long as he shall live; the first payment of said sum, as such annuity, to become due and be paid in one year from this date, and a like sum to become due and be paid to him in each and every year thereafter, so long as he shall live, on the twenty-ninth day of May, in each and every year during his lifetime.

"It is agreed and understood, however, between the undersigned and said Charles Darby, that he may have a home with me, the undersigned; I furnishing him such home, clothing, nursing, medicines, attendance of doctors, and all other necessities of board, lodging, and of life, in sickness and in health, during his said lifetime, and as he shall need and require any or all of the same, and he to allow and credit me therefor, for the same, in sickness and in health, always and only, the sum of two dollars per week.

"This instrument is secured by a real estate mortgage executed by the undersigned to said Charles Darby, bearing even date herewith; the condition hereof being certain real estate this day conveyed to me by said Charles Darby.

"This dated May 29, 1879.

"CHARLES F. DARBY. [L. S.]"

Upon the back of the agreement various amounts are indorsed, and complainant, who is the administrator of Charles Darby, claims that at the date of the hearing there was due upon the contract, upon the face of the papers, eight hundred and sixty-nine dollars and seventeen cents. This is made up of four items, viz.: The first three consist of amounts which it is claimed were unpaid for the years 1880, 1881, and 1882, the indorsement for each of those years being two hundred and eighty dollars only. The other item is two hundred and twenty-two dollars and eighty-four cents, being a proportionate part of the yearly payment, which complainant claims should be paid for the time Charles Darby lived after the last payment, made May 28, 1893, Darby having died December 28, 1893. Interest upon these sums swells the amount to the sum claimed. Charles F. Darby, the son, died on December 25, 1882, and the premises went to his widow, Phoebe, under his will. The bill was filed to foreclose the ³¹⁷ mortgage, and the defendant, Phoebe Darby, filed an answer in the nature of a cross-bill, denying that any amount is due upon the mortgage, alleging its full payment, and praying its cancellation and discharge.

As we understand counsel, there are two questions in the case. The first is, whether the sums indorsed for 1880, 1881, and 1882, were the balance due to Charles Darby after applying the yearly sum of one hundred and four dollars for board furnished by the defendant. This is a question of fact. Second, whether anything is collectible for the fractional year; defendant contending that these papers created an annuity, and that nothing was due for the year 1894, as the annuitant failed to reach the day when it would have been due had he lived.

It seems plain that Charles Darby lived upon the premises, at an agreed price of two dollars a week, for three years; and we see no reason for doubting the justice of the conclusion reached by the learned circuit judge, that payment in full was made for the three years in controversy.

The contract is an obligation to pay annually a sum which the parties have seen fit to call an "annual annuity." Perhaps the word "annual" should be discarded as surplusage, but, if to be given any force, it emphasizes the word "annuity," which, under 1 Howell's Statutes, section 2, subdivision 1, must be given the technical meaning, unless we can find in the contract some indication that a different meaning was intended, which we do not. If it is to be considered an annuity, it is not apportionable; the cases upon the subject being numerous, and generally uniform: See cases cited in the briefs of counsel. The exceptions generally recognized are where the annuity is granted to a married woman living separate from her husband, and for the maintenance of minors. In such case it is based upon a supposed necessity growing out of their want of capacity to contract. In Pennsylvania this has been extended to annuities given in lieu of dower, or to widows. In *In re Lackawanna etc. Co.*, 37 N. J. Eq. 26, ³¹⁸ this apparent extension of the exception is followed, and perhaps enlarged. But the great weight of authority is against the contention of complainant. The case is so well briefed that it is unnecessary to repeat authorities. In some states they are made apportionable by statute: See *Kearney v. Cruikshank*, 117 N. Y. 95. The fact that Charles Darby was indebted at his death is unimportant. The contract shows that less than one-third of his annuity was required for his board in sickness and health, and the fact that he could not or did not find the annuity adequate to his wants does not authorize a court to make a different contract from that which he was content to make for himself.

The decree of the circuit court must be affirmed, and a decree entered here dismissing complainant's bill, with costs, and de-

claring the mortgage satisfied, canceled, and discharged, and authorizing the record of a copy of the decree as evidence of such fact. It is so ordered.

The other justices concurred.

ANNUITIES—APPORTIONMENT.—Where a son for a valuable consideration agreed to pay his father a specified sum, on a fixed day, annually during the father's life and the latter died twenty days prior to the day for payment, his administrator was not allowed to recover the proportion accrued and unpaid at the time of his death: *Heizer v. Heizer*, 71 Ind. 526; 36 Am. Rep. 202. A provision in a will for the payment of "five hundred dollars per year for ten years to" B, in equal quarterly installments, is an annuity contingent on B's life, and not a legacy of five thousand dollars payable in installments: *Bates v. Barry*, 125 Mass. 83; 28 Am. Rep. 207.

DETROIT CITIZENS' STREET RAILWAY CO. *v.* DETROIT.

[110 MICHIGAN, 384.]

MUNICIPAL CORPORATIONS—STREETS—EXCLUSIVE FRANCHISE IN.—A municipal ordinance granting to a street railroad company the exclusive right to construct and operate a railway upon certain streets and to construct such new lines as the city council may from time to time determine, is an attempted grant of an exclusive privilege, although reserving the right to grant to other companies the privilege of operating upon such streets in case the first company fails to extend its lines to streets designated by such council.

MUNICIPAL CORPORATIONS—POWER TO GRANT EASEMENT IN STREETS.—A municipality has no power to grant exclusive rights in streets to street railway or other corporations except upon authority from the legislature, given explicitly, and clearly expressed. In construing charters and statutes conferring such power, the authority to grant exclusive privileges cannot be implied from the use of general language.

MUNICIPAL CORPORATIONS—STATUTORY CONSTRUCTION OF POWER CONFERRED.—A statute conferring powers upon a municipality is presumed to have been framed and adopted with reference to the rule that nothing is to be taken by intendment in construing a legislative grant of power, and this rule is not rendered inapplicable because the powers delegated cannot be exercised by the legislature directly.

MUNICIPAL CORPORATIONS—EASEMENTS IN STREETS.—The power of a municipality to grant an easement in streets to a street railway company is not inherent, but is derived solely from the legislature.

MUNICIPAL CORPORATIONS—STREETS—RIGHT TO CONTROL.—A constitutional provision that the state shall not be interested in any work of internal improvement, nor vacate nor alter any road laid out by highway commissioners, nor any city street, does not take from the legislature and confer upon municipalities the absolute and supreme power over streets.

MUNICIPAL CORPORATIONS—STREETS—EXCLUSIVE FRANCHISES IN.—Power to grant exclusive privileges to occupy

streets for street railways is not conferred upon a municipality by a statute providing that "all companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

Brennan, Donnelly & Van De Mark, A. Pond, F. A. Baker, F. S. Smith, and J. C. Carter, for the appellant.

J. J. Speed, C. Flowers, B. Hanchett, and H. H. Hatch, for the appellees.

386 MONTGOMERY, J. The bill in this case was filed to restrain the defendant the Detroit Railway from constructing and operating a street railway in certain streets in the city of Detroit, the complainant claiming to have a prior right to construct and operate a street railway in such streets under and by virtue of an ordinance of the city. The complainant is the successor to the Detroit City Railway. By an ordinance approved November 24, 1862, the Detroit City Railway was "Exclusively authorized to construct and operate railways, as herein provided, on and through [certain named streets], and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit, and assented to in writing by said corporation; . . . and provided the corporation does not assent in writing within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track or rails already laid, at their own cost and expense."

By an ordinance passed in November, 1879, the rights conferred and the obligations imposed by the ordinance of 1862 were continued until November 14, 1909.

Complainant's predecessor, the Detroit City Railway, was organized under the train railway act (Act No. 148, Laws 1855, as amended), and at the date of the adoption of the first ordinance, in 1862, section 34 of that act provided that: "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through 387 the streets of any town or city without the consent

of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

In 1867 this section was amended by adding another proviso, which reads as follows: "Provided, further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof": Act No. 188, Laws 1867.

The question first in importance is, whether the common council of the city had the inherent power, or derived the power under this statute, to grant the privilege, not only to build such lines as were specifically designated in the ordinance of 1862, but to couple with this grant the grant of the first right to build any other lines which the city authorities might, in the future, elect to have constructed, on the same terms as were provided with reference to the lines specifically provided for in the ordinance of 1862. It is apparent from the reading of the statute that there was no express and direct authority conferred in terms upon the common council to grant an exclusive privilege to occupy the streets of the city for street railway purposes. An attempt has been made to distinguish the right of election sought to be conferred by the ordinance from a grant of an exclusive privilege, on the ground that the municipality reserves to itself the right to grant the privilege to other companies to construct street railways in case the first company shall elect not to build in designated streets. But while the ordinance does not, in terms, purport to be a direct grant of an exclusive use in all the streets of the city, it is a grant of an exclusive privilege, which the company is given ³⁸⁸ the option to avail itself of or not, at its pleasure. The legislative control over the streets is suspended during a period of thirty years, except in cases where the company shall, upon investigation, determine that a line does not give sufficient promise of profit to justify it in making the requisite expenditure, when, on its refusal to build, the city regains so much of its legislative authority as enables it to provide for the construction of a particular line; but as to other streets and other lines its power is still suspended. Nor would it be possible, under the construction contended for by complainant, for the city to make other or

better terms with another company prepared to build independent or competing lines. We consider that this is none the less a grant of an exclusive privilege because of the option reserved to the company to build or not, and that the rules of construction which obtain in construing such grants, and in determining whether the power to make such grant exists, should be applied.

The general rule, established by the weight of authority, is that municipal corporations have no power to grant exclusive rights to street railway, gas, or water companies, except upon authority from the legislature, given explicitly, and clearly expressed; and that, in construing charters and statutes conferring upon a municipality the right to provide for these conveniences, the authority to grant exclusive privileges will not be implied from the use of general language: Booth on Street Railway Law, sec. 108; Grand Rapids etc. Co. v. Grand Rapids etc. Co., 33 Fed. Rep. 659; Jackson etc. Ry. Co. v. Interstate etc. Ry. Co., 24 Fed. Rep. 306; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; Parkhurst v. Capital City Ry. Co., 23 Or. 471; Long v. Duluth, 49 Minn. 280; 32 Am. St. Rep. 547; 2 Cook on Stocks and Stockholders, sec. 913. It is conceded that the weight of authority establishes this rule, but it is contended that this is, after all, but a rule of construction, and that the paramount rule of construction is that the intent of the legislature, when gathered ³⁸⁹ from the whole terms of the enactment, should control. We recognize the force of this latter rule, except in a case where it crosses lines with another well-understood rule of construction. But courts are not at liberty to resort to this rule, and to discard another rule of construction; for, in ascertaining the intent, it must be assumed that the statute was adopted in view of the recognized rule that nothing is to be taken by intendment in construing a legislative grant of power.

The principal contention of complainant's counsel is, that the policy of our constitution, which favors local self-government, should have controlling effect in determining the legislative intent in this case, and that because of this policy the cases cited from other states to sustain the proposition that a municipality does not possess the power to grant an exclusive privilege, except the same be conferred in express terms, should not have controlling effect. To some extent counsel for complainant differ in the scope of their contention as to the effect of certain provisions of our constitution. The contention, as it is made in the brief of one of complainant's counsel, is that, under our constitution,

the sovereign power over all public streets and highways (except state roads laid out under swamp land grants) is taken from the state legislature, and distributed among the townships, cities, and villages of the state, to be separately exercised by them; and that, therefore, the local authorities, in making street railway grants, and in agreeing upon the terms and conditions thereof, exercise an original power vested in them by the constitution of the state, and that they do not in any sense act as the agents of the state legislature by virtue of a mere delegation of authority. The provisions of the state constitution which are cited as establishing this policy are article 14, section 9, article 11, section 1, and article 4, section 23. Article 11, section 1, provides for the election of highway commissioners and overseers in townships and road districts, and can have no bearing upon the question, except as it may tend to show the general policy of the people³⁹⁰ in dealing with the subject of highways. Article 14, section 9, reads: "The state shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of land or other property." And article 4, section 23, provides: "The legislature shall not . . . vacate or alter any road laid out by commissioners of highways, or any street in any city or village, or in any recorded town plat." It is contended that these provisions take away the power from the legislature, and transfer it to the local governments. In support of this contention we are cited to the cases of *Hubbard v. Township Board*, 25 Mich. 153; *Davies v. Board of Supervisors*, 89 Mich. 295; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *People v. Common Council*, 28 Mich. 228; 15 Am. Rep. 202; *People v. Common Council*, 29 Mich. 108.

In *Hubbard v. Township Board*, 25 Mich. 153, the question arose as to the validity of an act of the legislature authorizing an appointment by the governor of commissioners to improve Fort street, in the township of Springwells, and to collect tolls. The township was required to issue bonds and submit to taxation for the purpose of paying for the improvement. It was held that this was a work of internal improvement, and as such could not be undertaken by state agencies, and it was further held that, as commissioners and overseers of highways were constitutional officers, their functions could not be wholly abolished, nor could they be elected or appointed by other authority than the township. In this latter holding the court followed *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103. But in *Hubbard v. Town-*

ship Board, 25 Mich. 153, the court by no means holds that the control of the streets by the local authorities is supreme; on the contrary, it was said that the power of the highway commissioners was subject to legislative modification.

³⁹¹ In *Davies v. Board of Supervisors*, 89 Mich. 295, the court held, following *Hubbard v. Township Board*, 25 Mich. 153, that it was incompetent to withdraw from the local authorities provided for by the constitution the functions of their offices, and confer them upon a board appointed by a power removed from, and not responsible to, local authority.

The scope of the earlier decisions is clearly stated by Mr. Justice Cooley in *People v. Common Council of Detroit*, 28 Mich. 240; 15 Am. Rep. 210. After stating that the opinion in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, had been misapprehended, Justice Cooley said: "We intended, in that case, to concede most fully that the state must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess, and that it must also decide what restrictions should be placed upon these, as well to prevent clashing of action and interest in the state as to protect individual corporators against injustice and oppression at the hands of the local majority. And what we said in that case we here repeat—that while it is a fundamental principle in this state, recognized and perpetuated by express provisions of the constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of general policy, as well as those which pertain to the local benefit and local desires. And in conferring those powers it is not to be disputed that the legislature may give extensive capacity to acquire and hold property for local purposes, or it may confine the authority within narrow bounds; and what it thus confers it may enlarge, restrict, or take away at pleasure."

This is a clear exposition of plain provisions of the constitution. Article 4, section 38, reads: "The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper." ³⁹² The limitations upon this broad power to confer or withhold authority are that the legislature may not withhold authority from the local authorities, and confer it

upon an outside agency; and under the provisions of article 4, section 23, it may not vacate or alter any road laid out by the commissioner or local authorities. Since the adoption of the constitution many acts have been passed relating to the control of streets, and imposing duties upon local authorities; and in special charters, as well as in the general act for the incorporation of cities, it has been deemed essential to confer and define the extent of the control over streets reposed in municipal authorities. This court, in the case of *Taylor v. Bay City Street Ry. Co.*, 80 Mich. 77, Mr. Justice Grant, speaking for the court, said: "Municipal corporations derive their sole source of power from legislative enactments": See, also, *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *Grand Rapids etc. Co. v. Grand Rapids etc. Co.*, 33 Fed. Rep. 659; *Detroit Citizens' Street Ry. Co. v. Detroit*, 12 Co. Ct. App. 365; 64 Fed. Rep. 628; *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450. The power of a municipality to grant an easement in the street to a street railway company is not inherent, but is derived from the legislature.

It is, however, strenuously urged upon us that, in view of the general policy in favor of local self-government, which is evidenced by the provisions of the constitution quoted and the decisions of this court, the grant to the municipality by the legislature should receive a construction more liberal than if it were a delegation of power which the legislature could itself exercise; it being urged in the same connection that the legislature could not grant an easement or right to use a particular street for street railway purposes. Without affirming or denying the latter proposition, we do not think the precedent contention would be solved by a determination of that question. It is clear that whatever power the local authorities have to grant an easement in the street for street railway purposes is derived from the legislature, whether ³⁰³ the streets of a city be directly controlled by the legislature in such sense that a direct grant may be made, or whether the trust be one which may be executed through certain local authorities only. The reasons for construing a grant of authority with strictness are equally forcible. Whether such a franchise be the subject of a grant by the state direct or by the local authorities, the power over the streets is a trust, and the authority to grant an exclusive right ought not to be implied any the more because the legislature has not reserved to itself, or does not originally possess, the power to grant an easement in a particular street. The question whether such power is reserved to the legislature seems not to have been allowed to con-

trol the rule that the power to grant an exclusive franchise or right will not be inferred. In *Parkhurst v. Capital City Ry. Co.*, 23 Or. 471, the court states the question as follows: "The precise question then is, Had the city of Salem, under the grant of an exclusive power 'to permit, allow, and regulate the laying down of tracks for street-cars' upon such terms and conditions as it may prescribe, the power to grant for a term of years the exclusive right to occupy its streets with street railroads?"

The court said: "It is true this power, so far as granted, is by the charter made exclusive; that is, the city alone has the right and power to permit, allow, and regulate the use of its streets for the purpose indicated. To this extent it is endowed with complete legislative sovereignty. That sovereignty has no limit so long as the city keeps within the powers granted.

Yet, notwithstanding this, it was held that, as the power to grant an exclusive privilege was not expressly conferred, it was not to be implied. Indeed, the argument in favor of the necessity that the power to grant exclusive privileges be lodged somewhere would apply with substantially the same force in case of a delegation of power which the legislature may exercise directly as ³⁹⁴ in a case where the power is conferred upon the local authorities as the only means of granting an easement. Certainly, the difference is only in degree, as during the recess of the legislature the power would, in the former case as in the latter, be in the local authorities.

One very solid ground upon which the cases which hold that authority of a municipality to grant an exclusive privilege is not to be inferred in the absence of an express grant rests is that a franchise of that nature is in restraint of free competition. It does not detract from the force of these authorities that in some of the cases there has been stated a further reason that the legislature will not be presumed to have delegated its own authority except to the extent that such delegation of power is clearly expressed. In *State v. Cincinnati Gaslight etc. Co.*, 18 Ohio St. 262, it was said: "We have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute-book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529, Judge Brown said: "Nothing is better settled than that statutes creating monopolies, granting franchises and charters of incorporation, must be construed liberally in favor of the public, and strictly as against the grantee."

We think the act in question cannot be construed as conferring the power upon the common council to grant such a privilege as that which was attempted to be conferred by the ordinance of 1862. Certainly, there is no express grant of the right to confer exclusive privileges, nor do we think that there is any clear implication of ³⁹⁵ any such power arising out of the terms of the act. There is a limitation upon the right of the company to construct a railway, which is that, before doing so, the company shall procure the consent of the municipal authorities under such regulations and upon such terms and conditions as said authorities may from time to time prescribe. Fairly construed, this language relates to the terms and conditions to be prescribed for the contemplated occupancy of streets the use of which is presently contemplated by the parties to the contract, and the "terms and conditions" relate to such occupancy of such streets. A broader construction is contended for, and it is said that the power to make terms and conditions carries with it an implication of power to make all terms and conditions relating to the subject matter necessary to effectuate the object of the legislation; and that it is to be assumed, and, indeed, that the evidence in the case fairly indicates, that the grant of this exclusive privilege was essential in order to induce the railway company to undertake the construction of a railway. Of a similar contention it was said, in the case of *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547: "It may be said that the power to contract would be useless unless the privilege conferred may be made exclusive, for otherwise private corporations or persons would not engage in an undertaking involving the necessity for very large expenditures of capital in works which might be rendered unprofitable, if not valueless, by the subsequent action of the municipal or state government. The argument is not without force. The cases cited above, and others, show that it has often been advanced in support of claims of exclusive privileges; but it has rarely, if ever, prevailed. It suggests considerations of policy which may influence the legislature to grant or to authorize the granting of exclusive privileges; but the principles in accordance with which legislative grants of this kind are to be construed seem to be so clearly established that generally not much weight

can be given to such an argument in determining the effect of particular legislative action"; ³⁹⁶ See, also, *Grand Rapids etc. Co. v. Grand Rapids etc. Co.*, 33 Fed. Rep. 671.

Assuming good faith on the part of the municipalities and private corporations contracting with them to be the rule, it would be difficult to imagine a case in which the attempted exercise of the right to grant an exclusive privilege could not be fortified by a well-grounded claim of necessity. We think an implication of power cannot be built up upon this claim.

Having reached the conclusion that the court below was right in holding that legislative authority to grant the privilege in question did not exist, it becomes unnecessary to discuss the numerous interesting collateral questions which have been raised and argued by counsel.

The decree of the court below will be affirmed, with costs.

The other justices concurred.

MUNICIPAL CORPORATIONS—POWERS—GRANTING EXCLUSIVE FRANCHISES.—Municipal corporations have no power to grant exclusive franchises or privileges unless such power has been conferred upon them by a statute explicit and free from doubt: *Long v. Duluth*, 49 Minn. 280; 32 Am. St. Rep. 547. This limitation prohibits grants of exclusive right to use the streets for certain purposes to an individual or corporation: *Cincinnati etc. Ry. Co. v. Telegraph Assn.*, 48 Ohio St. 390; 29 Am. St. Rep. 559. Under legislative authority authorizing railroad tracks to be laid in streets, a municipality has no power to grant the exclusive use of a street to a railroad company: *Ligare v. Chicago*, 139 Ill. 46; 32 Am. St. Rep. 179, and note. An irrevocable grant by a city of the exclusive privilege to construct and operate a street railway is unconstitutional: *Birmingham etc. Street Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465; 58 Am. Rep. 615.

MUNICIPAL CORPORATIONS—POWERS—CONSTRUCTION OF—CONTROL OF STREETS.—A municipal corporation possesses no powers except those conferred upon it expressly or by fair implication from the law creating it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes: *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 822, and note. Any fair and reasonable doubt concerning the existence of power in a municipal corporation is resolved against it and the power denied: *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96, and extended note. The streets of an incorporated town are public highways, and the regulation thereof given to the corporation for corporate purposes is subject to the paramount right of the state to provide for a more general and extended use of them: *Case of Philadelphia etc. R. R. Co.*, 6 Whart. 25; 36 Am. Dec. 202. A city may exercise such powers over them as are vested in it by its charter, or are incident to an express delegation of power: *State v. Mayor etc.*, 5 Port. 279; 30 Am. Dec. 564; *Stanley v. Davenport*, 51 Iowa, 463; 37 Am. Rep. 216, and extended note.

JOHNSON v. FARMERS' MUTUAL FIRE INSURANCE CO.

[110 MICHIGAN, 485.]

INSURANCE—ASSESSMENTS.—The charter of a mutual fire insurance company providing that all assessments shall be made by the board of directors, who shall ascertain the amount of loss, determine the sum to be raised as a surplus fund, and make an assessment embracing the loss, the expenses incident thereto, and the sum to be raised as a surplus, which assessment shall be handed to the secretary, who shall inform the members in writing, requires action by the board of directors, in all essential particulars, to the extent of determining the necessary steps to be taken in making the assessment, or at least formally adopting it at a meeting of the board after the performance of the necessary clerical work, and an assessment made by the secretary under a resolution of the board failing to indicate the steps to be taken in making it, is invalid and cannot be rendered valid by the individual ratification of the directors without a formal meeting.

INSURANCE—FORFEITURE FOR NONPAYMENT OF ASSESSMENTS.—A forfeiture of insurance in a mutual insurance company for nonpayment of an assessment cannot be sustained when such assessment is not made by the officers designated by law.

M. H. Walker, for the appellant.

Taggart, Knappen & Denison, for the appellee.

488 HOOKER, J. The plaintiff had insurance to the amount of three thousand five hundred dollars upon his buildings, in a mutual fire insurance ⁴⁸⁹ company. Some of these buildings being destroyed by fire, he sued the company upon the policy; and the company defends upon the ground that the policy was not in force at the time of the fire, owing to the fact that an assessment was overdue and unpaid. The record shows that on July 30, 1894, the board of directors met, and passed a resolution to make an assessment of three mills on the dollar, on the capital of the company, to pay its indebtedness to that date, and for a surplus fund to pay future losses; to allow the president and treasurer four per cent for the collection of assessments, and to the secretary one hundred and forty dollars for making the roll, paying postage and printing, and notifying the members of their assessments. The secretary thereupon proceeded to make an assessment of the date of October 1, 1894, dividing members into fifteen classes, upon the basis of the dates of their membership. This took no notice of periods less than a month. Those who were members on the 9th of November, 1893, were assessed three dollars upon one thousand dollars; those who joined later, proportionately less—so that the total amount assessed was less than the amount required by the reso-

lution. Notice of the assessment was served, but the plaintiff forgot to pay it until after the fire, and defendant's counsel relies upon the provision of the by-law which suspends policies while assessments are due and unpaid. On the other hand, it is contended that the directors did not determine the date of the assessment, the amount of losses to be assessed for, the members liable to assessment for the respective losses (which were over fifty in number), the amount to be raised as a surplus fund, or the method to be followed in apportioning the amount to be raised.

The following provisions of the charter are pertinent at this juncture:

"5. The board of directors of said company shall . . . make all assessments in case of fire or other indebedness."

490 "17. In case of fire, the directors shall meet within ten days after the secretary shall be informed in writing by the owner of the property burned, who shall inform each director forthwith, by writing, and stating the day and hour of such meeting; the place to be at or near the property burned.

"18. At this meeting of the directors they shall ascertain the amount of loss, and determine a sum proper to be raised as a surplus fund for the payment of losses and other necessary expenses (the assessment of which fund shall not exceed one dollar on each thousand dollars of capital of the company), and shall proceed to make an assessment-roll, embracing the loss ascertained, the expenses incident thereto, and the sum to be raised as a surplus fund, which assessment shall be handed to the secretary, who shall inform each member by writing, stating capital of company, name of loser, amount of loss, sum raised as a surplus fund, the amount assessed on one thousand dollars of the capital of the company; also the amount of his or her assessment. The president shall also appoint a receiver in each township to receive the sums assessed in their respective townships."

"20. All members are to be ratably assessed."

In our opinion, these provisions require action by the board, in all essential particulars, to the extent of determining the necessary steps to be taken in making the assessment, or at least formally adopting the same, at a meeting of the board, after the performance of the necessary clerical work.

It is contended that the signatures of the five directors to the warrant attached to the assessment-roll was a ratification of what had been done. The record shows that no meeting of the board was held after that of July 30th or 31st, and we think individual

action of the directors should not be allowed to take its place: *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341.

The authorities appear to be substantially unanimous in support of the proposition that forfeitures for nonpayment of assessments cannot be sustained where the assessment is not made by the officers designated by law. ⁴⁹¹ Members have a right to the judgment, care, and skill (or at least supervision) of those lawfully charged with the performance of this duty. Counsel cite many authorities in support of this rule; among them: 2 May on Insurance, sec. 560 b; *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571; *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341; *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134; 2 Bacon on Benefit Societies, sec. 377; *Baker v. Citizens' etc. Ins. Co.*, 51 Mich. 243; *Bates v. Detroit etc. Ben. Assn.*, 51 Mich. 587; *Warner v. National Life Assn.*, 100 Mich. 157; *Miner v. Michigan Mut. Ben. Assn.*, 63 Mich. 338. Our understanding is, that this assessment does not conform to this requirement, and the judgment is therefore affirmed.

Grant, Montgomery, and Moore, JJ., concurred. Long, C. J., did not sit.

INSURANCE—MUTUAL—LEVY OF ASSESSMENTS—FORFEITURE FOR NONPAYMENT.—Assessments not legally made need not be paid, and no rights are lost by nonpayment: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784. The association has the burden of proving that a mortuary assessment for the nonpayment of which it seeks to avoid its liability on a benefit certificate was duly authorized, and that proper notice thereof was given: *Shea v. Massachusetts etc. Assn.*, 160 Mass. 289; 39 Am. St. Rep. 475. See, also, monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 572-574, which considers exhaustively the law governing mutual benefit societies.

FULLER v. KANE.

[110 MICHIGAN, 549.]

CONTRACTS—CHANGE IN LAW.—Every contract, not expressly providing to the contrary, is presumed to have been made with reference to the then existing state of the law, and if a subsequent change is made therein which in any degree affects such contract, such change is presumed to be excepted therefrom.

MORTGAGES—DUTY TO PAY TAXES—CHANGE IN LAW. A provision in a mortgage that the mortgagor shall pay all lawful taxes and assessments levied against the mortgaged premises, does not make him liable for taxes, which, by virtue of a subsequent change in the law, are levied against the mortgagee's interest in the premises.

Gray & Gray, for the appellant.

E. E. Kane, for the appellee.

⁵⁴⁹ MONTGOMERY, J. Prior to 1891, mortgages were assessed against the mortgagee, and the real estate was assessed against the owner. By the act of 1891, the legislature provided for the assessment of mortgages as an interest in lands, and relieved the mortgagor from taxation upon so much of his property as the mortgagee's interest represented. Prior to the enactment of this law, in October, 1889, the defendant executed a mortgage, with a condition to "pay and discharge, or cause to be ⁵⁵⁰ paid, within the time prescribed by law, all such taxes and assessments as shall by any lawful authority, while the money secured by these presents remains unpaid, be levied and imposed upon said premises above described"; and it was also agreed that "should any default be made in the payment of the taxes and assessments as above provided, or any part thereof, then in such case it shall be lawful for the party of the second part, her heirs or assigns, . . . to pay and discharge such taxes and assessments, and the money thus paid shall be a lien on said premises, added to the amount secured by these presents, and shall be payable on demand, with interest at five and one-half per cent per annum."

The sole question presented in this case is, whether the stipulations above quoted imposed upon the mortgagor the duty of paying taxes assessed under a law subsequently passed, providing for an assessment against the mortgagee's interest. The learned circuit judge was of the opinion that this undertaking was not to be so construed, and in that opinion I concur. As was said by Pollock, C. B., in *Mayor etc. of Berwick v. Oswald*, 3 El. & B. 678: "Every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law, and if, by the intervention of the legislature, a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect and possibility of a change, does not hold with reference to the state of things as altered by the new law."

This opinion is cited with approval in *Endlich on Interpretation of Statutes*, section 461, where it is said: "The intervention of the legislature in altering the situation of the contracting parties is analogous to a convulsion of nature, against which they no doubt may provide, but, if they do not provide, it is generally to be considered as excepted out of the contract."

In this case, we think there is nothing in the language of the contract which evidences a purpose to extend the ⁵⁵¹ obligation of the mortgagor so as to make it include the duty of paying taxes which by subsequent legislation it is made the duty of the mortgagee to pay. The case cited above is instructive, and, while the opinion of Baron Pollock is a minority opinion, the conclusion of the majority appears to be based upon the view that language is employed in the contract under consideration which could not be operative if limited to conditions existing under the law in force at the time it was entered into, so that the principle announced by Baron Pollock seems not to have been controverted. We are cited to the case of *Hammond v. Lovell*, 136 Mass. 184, as sustaining the contention of plaintiff. In that case it is implied in the opinion that, prior to the enactment of the statute making the change in the manner of assessing taxes, the mortgagee, if in possession, was liable to be assessed upon the land, and that in that state the legal title to the mortgaged property is vested in the mortgagee. This would distinguish the cases, as, if such be the state of the law in Massachusetts, the undertaking to pay all taxes and assessments on the premises might, under the prior existing law, have imposed the obligation of paying the mortgagee's taxes. However this may be, we are fully convinced that this provision should not be given the broad construction contended for, under the statutes of this state, and that the judgment should be affirmed.

The other justices concurred.

CONTRACTS—LAW OF PLACE AND TIME AS AFFECTING. The laws which subsist at the place and time of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms: *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note. The remedy afforded by existing laws enters into and forms part of the obligation of contracts: *Von Baumbach v. Bade*, 9 Wis. 559; 76 Am. Dec. 283.

LUMLEY v. HAGGERTY.

[110 MICHIGAN, 552.]

ADVERSE POSSESSION.—The possession of a life tenant cannot be adverse to a remainderman.

ADVERSE POSSESSION—OCCUPANCY BY WIDOW.—Under a statute providing that a "widow entitled to dower in the lands of which her husband died seised may continue to occupy the same with the children or other heirs of the deceased," so long as the latter do not object, without having dower assigned, a widow

who continues to occupy such lands with the minor children without objection by any of the interested parties, after disclaiming under a will giving her a life estate and without an assignment of dower, is not in adverse possession as against a remainderman under the will.

E. Weeks and J. Atkinson, for the appellant.

C. K. Latham, for the appellees.

⁵⁵² LONG, C. J. In 1853, Hugh Haggerty was the owner of about four hundred acres of land in the township of Springwells, Wayne county, this state. On September 21st of that year he made a will, by which he gave to his wife, Fannie, a life estate in all the lands of which he should die seised ⁵⁵³ with the remainder over to his son Henry Haggerty. On the day before the will was executed, he had executed deeds of most of his real estate to his children. His wife did not join in these deeds. He died the same day the will was executed. Within a year after the death of Hugh, his wife filed in the probate court a written declination to take under the will, containing a request that her dower might be assigned to her in the lands of her deceased husband. An order was made requiring the parties interested in the estate to appear upon the hearing of the petition to assign the widow's dower, but no further proceedings were ever taken in that matter. The deeds made by Hugh did not cover the homestead, and after his death the widow continued to live there with the minor children, and occupied the homestead up to the time of her death. This homestead covers the thirty-three acres now in controversy here. The widow, Fannie Haggerty, made her will on January 6, 1872, devising to her daughter, the plaintiff in this case, the residue of her estate after the payment of her debts and funeral charges. She died June 7, 1893. It appears that Henry Haggerty surveyed the homestead in the year 1880, and made an equal division of it to his four children, one of whom has since died. The other three are defendants in this case, Robert Hooten being made a party by reason of his tenancy under one of the children of Henry.

This action is in ejectment. The plaintiff claims through the will of her mother; the defendants, through deeds from their father. Plaintiff's contention on the trial was, that Fannie Haggerty having filed her declination to take under the will of her husband, her life estate terminated, and, her dower not having been assigned, she had no possessory rights in the property, but that Henry, having the estate in remainder under the will, had a right of entry immediately thereafter. It was further con-

tended by the plaintiff that Henry never asserted any rights in the property thereafter, but, on the contrary, acquiesced in the rights ⁵⁵⁴ which the widow claimed; that the widow thereafter exercised acts of ownership over the land, claimed title, and that it was thereafter called and recognized as hers; that roads and ditches were opened through the land, and the damages awarded to her, and for the opening of the ditches the widow paid the expenses; that she had paid the taxes, and had cut and sold wood off the premises without objection from Henry. It is also claimed that a settlement was had between the widow and Henry at or about the time she declined to take under the will, but just what settlement was made, if any, is not shown by this record. Defendants contended on the trial that the declination filed by the widow was defective in several particulars, and that the fact that she never carried her proceedings forward for the assignment of her dower is evidence that she abandoned them, and therefore claimed as a life tenant under the will; that this fact is shown by two leases which were made by her, some time before her death, to the husbands of two of her daughters, to continue for and during her own natural life. At the close of the testimony the court below directed the verdict in favor of the defendants.

Counsel for plaintiff contend that the question should have been submitted to the jury to determine the character of the possession of the widow for the forty years she lived on the homestead after the death of her husband—whether she was there by the consent of the children, claiming as a life tenant, or claiming to hold adversely to Henry. If the defendants' first contention be correct—that the declination made by the widow was ineffectual to end her life estate—that would end the case; for, being in as life tenant, her possession could not be treated as adverse to the remainderman. But, if this contention be not sustained, we are of the opinion that there is nothing appearing upon the record showing, or tending to show, that the widow was holding adversely to Henry. 2 Howell's Statutes, section 5744, provides that: ⁵⁵⁵ "When a widow is entitled to dower in the lands of which her husband died seised, she may continue to occupy the same with the children or other heirs of the deceased, or may receive one-third part of the rents, issues, and profits thereof, so long as the heirs or others interested do not object, without having the dower assigned."

There is nothing in the record, that we are able to discover, showing, or tending to show, that any of the heirs, or others

interested, during all the time the widow occupied the homestead, ever made objection to such occupancy by her. It was the homestead of her husband and herself and family. At his death she continued in possession with the minor children, the youngest of whom was nine years of age. Others were minors. Even after the declination to take under the will, the widow made no change in her surroundings, kept the family at the homestead until they married, and from that time forward no one seems to have made complaint. Such holding by her, under the circumstances here shown, cannot be construed as adverse to Henry, who was given the remainder by the will. Her right to occupy the premises continued until her dower was assigned, or some steps were taken to partition the estate: *Zoellner v. Zoellner*, 53 Mich. 620, 627; *Rea v. Rea*, 63 Mich. 263; *Kitchell v. Mudgett*, 37 Mich. 81; *Benedict v. Beurmann*, 90 Mich. 396. The continuance of the widow upon the homestead after her disclaimer under the will was not an ouster of Henry, but, under the statute above quoted, was a legal entry, and, so long as Henry and the other heirs made no objection, her continuance in possession was not adverse: *Hall v. Mathias*, 4 Watts & S. 331; *Cook v. Nicholas*, 2 Watts & S. 27.

We think the court below very properly directed the verdict in favor of defendants. The judgment must be affirmed.

The other justices concurred.

ADVERSE POSSESSION — BETWEEN LIFE TENANT AND REMAINDERMAN.—The possession of a life tenant is not adverse to the remainderman or reversioner: *Meacham v. Bunting*, 156 Ill. 586; 47 Am. St. Rep. 239; note to *Nelson v. Davidson*, 52 Am. St. Rep. 343. The possession of a widow, so long as her dower remains unassigned, is not adverse to the heirs, nor to one who purchases under a sale made by the administrator of her deceased husband: *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399, and note; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 73, and note.

WARNER v. DELBRIDGE AND CAMERON COMPANY.

[110 MICHIGAN, 590.]

CORPORATIONS, FOREIGN — LIABILITY OF MEMBERS.—One who becomes a member of a foreign corporation must take notice of the provisions of its charter, and subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation.

CORPORATIONS, FOREIGN — INSURANCE — LIABILITY OF MEMBERS.—An assessment made upon the premium notes of the holder of mutual policies in a Minnesota insurance

corporation, made under the statutes of that state and decided to be valid by the courts of that state, to repay unearned premiums on cash policies issued by such corporation, may be enforced in the courts of Michigan against a member of such corporation residing therein, although such assessment would be invalid if the contract of the policy holder were made in the latter state.

APPELLATE PRACTICE—WAIVER OF OBJECTIONS.—

An objection that it was not proved that a foreign insurance company had authority to do business within the state, cannot be made for the first time in the appellate court, so as to control the decision.

C. E. Warner, for the appellant.

E. E. Kane, for the appellee.

⁵⁹¹MONTGOMERY, J. On the 3d of April, 1890, defendant applied for and received a policy of insurance in the Minneapolis Mutual Fire Insurance Company, and executed and delivered the following agreement:

“Minneapolis, Minn., April 3, 1890.

“For value received, in policy No. 01,037, dated the 3d day of April, 1890, we promise to pay the Minneapolis Mutual Fire Insurance Company the sum of three hundred and seventy-five dollars, by installments, at such times as the directors of said company may order and assess, for the losses and expenses of said company, pursuant to its charter and by-laws. It is hereby expressly understood and agreed that this note is not transferable, and that there is no liability beyond the face amount thereof.

“No. 01,037.

“DELBRIDGE, CAMERON & DINGEMAN CO.”

On the 18th of December, 1890, an application was made by a policy holder, in the district court of Hennepin county, Minnesota, alleging the insolvency of the company, and praying for the appointment of a receiver, and the distribution of its assets among the creditors entitled thereto. On the 24th of January, 1891, a decree passed adjudging the insurance company insolvent, and appointing a receiver. On the 19th of May following, an order making an assessment of fifty per cent upon all premium notes and policy obligations was made; but this order was subsequently set aside as illegal, and a petition was filed showing the financial condition of the company, and the necessity ⁵⁹² for an assessment; and February 3, 1894, an order was made authorizing an assessment of one hundred per cent, or as much thereof as might be necessary to pay the claims which accrued against the said insolvent company during the time said policies were in force, to be levied upon the balance due upon each and all of said premium notes and policy obligations at the

time of the appointment of a receiver for the insolvent company, in 1890. This order further directed that upon this assessment the receiver should credit and deduct the amount of any special assessment theretofore made by the insurance company, and actually paid by the makers of the premium notes and policy obligations, and also the amount actually paid upon the assessment of fifty per cent theretofore ordered by the court. The items included in this assessment of one hundred per cent were for losses, salaries, unearned premiums on cash policies, and miscellaneous claims. On the application of the complainant in the original suit, made to the circuit court for the county of Wayne, in chancery, setting forth the proceedings in Minnesota, plaintiff was appointed an ancillary receiver in the state of Michigan. This suit was brought against the defendant to recover, upon the premium note mentioned, the one hundred per cent assessment. On the trial, the circuit judge directed a verdict for defendant, on the ground that the assessment was void, for the reason that it included an assessment for unearned premiums, acting upon the authority of Detroit etc. Ins. Co. v. Merrill, 101 Mich. 393.

If this contract is to be treated as a Michigan contract, the holding should be sustained, unless it be held that the order making the assessment, made at the situs of the home company, is conclusive, not only as to the authority to make the assessment, but as to the extent of the defendant's liability. This question was recently before the court in the case of Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 62 Am. St. Rep. 693, and the conclusion was then reached that the decision of the court of a sister state is binding upon the courts of this state in all these ⁵⁹³ respects. This conclusion was based upon the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state: U. S. Const., art. 4, sec. 1. And an examination of the decisions of the federal supreme court led us to the conclusion that the stockholder of a corporation is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member, and that a determination that an assessment upon the policy holders in a certain amount and for certain obligations of the company should be made was final and conclusive, and could not be attacked collaterally when suit was brought upon such assessment in another state. In reaching this conclusion, the question involved being a federal question, we felt ourselves

bound by the determination of the federal supreme court in *Hawkins v. Glenn*, 131 U. S. 319, and *Glenn v. Liggett*, 135 U. S. 533. But since the decision of this court in *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 62 Am. St. Rep. 693, the question has been again before the federal supreme court, and the doctrine of the cases upon which we relied for our decision limited; and in *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, it is held that an order making a call or assessment upon all stockholders of a corporation who have not paid their shares in full is merely such a call as the directors might have made before the matter was brought within the court's jurisdiction, and is not a judgment against the particular stockholder, so as to be entitled to such full faith and credit under the constitution and laws of the United States, and that in such action defendant is entitled to rely on any defense which he might have to an action upon the contract of subscription.

Plaintiff, however, contends that this is a Minnesota contract, and that under the statute of Minnesota, as interpreted by the supreme court of that state, an assessment ⁵⁹⁴ for unearned premiums upon nonparticipating policies was legal. The contract by which the insured became a member included, not only the note, but the policy, which contained the following provision: "The insured heretofore named becomes a member of this company, and agrees to pay them the premium annually, during the life of this policy, and, in addition thereto, such sum or sums, in no event to exceed in the aggregate five times the amount of said annual premium, at such time or times, and in such manner, and by such installments, as the directors of said company shall assess and order, pursuant to its charter and by-laws and the laws of the state of Michigan."

It is suggested by defendant's counsel that it is only for assessments for losses and expenses made according to the laws of Michigan that the defendant is made liable by its contract. It is difficult to understand the reference to the laws of the state of Michigan. This was certainly known by both parties to be a Minnesota corporation, and we are aware of no provision of the laws of this state which relates to the assessments authorized by such corporation. We think, therefore, that the contract must be treated as a Minnesota contract. Every corporation necessarily carries its charter wherever it goes; and, while it may be restricted in the use of some of its powers while doing business away from its corporate home, every person who deals with it everywhere, and particularly one who becomes a member of the

corporation, is bound to take notice of the provisions which have been made in its charter, and subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation: See *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537; *Relfe v. Rundle*, 103 U. S. 225.

The statute of Minnesota under which this company was organized authorized the company to engage in business and to receive premium notes, and provides that: ⁵⁹⁵ Every person effecting in any company organized under this act, and the heirs, executors, and assigns of such person continuing to be so insured, shall thereby become members of such corporation during the period of insurance, and shall be bound to pay for losses and such necessary expenses as may accrue in the management of such company, in proportion to the amount of such premium note": Gen. Stats. 1894, sec. 3261.

And in another section it is provided that whenever the capital stock of any company shall amount to the sum of two hundred thousand dollars, of which amount not less than forty thousand dollars shall be actual funds, such company may assume risks on the "all-cash" plan, and issue policies against loss or damage by fire or lightning to an amount not exceeding five per cent of its capital: Gen. Stats. 1894, sec. 3264. This statute has been construed by the supreme court of Minnesota in the case of *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, in which the court say: "This construction of the statutes and of the contracts under consideration leads also to the conclusion that the premium notes of the members of the corporation, which constitute its 'contingent fund,' may be resorted to, if necessary, to pay the unearned premiums on policies of simple (not mutual) insurance, whose holders sustain no other relation to the corporation than that of parties who had thus contracted with it. Such notes constitute a part of the 'capital' of the corporation, and comprise a part of the 'capital' required by the act of 1885 to be held by the company as a condition of its right to engage in this kind of insurance. They are to be deemed a part of the fund upon the credit of which such contracts of insurance are entered into."

It is to be noted that in *Detroit etc. Ins. Co. v. Merrill*, 101 Mich. 393, the policy was a policy upon the mutual plan, and the unearned premiums were unearned premiums on mutual policies. We think the statute of Minnesota, as construed by the supreme court of that state, must be deemed to be the law of the contract between the parties to this engagement, and that,

under this law, an assessment ⁵⁹⁶ for unearned premiums upon cash policies is within the contract.

These considerations would dispose of the case were it not that defendant's counsel contends that, even if the court was in error upon this question, the plaintiff failed to make a case. We have examined the points suggested by counsel, and deem it unnecessary to discuss them at length.

We think the construction of the order appointing plaintiff receiver which counsel makes is too technical. Plaintiff was appointed receiver of all equitable interests and choses in action, and of all property and assets, whether therein designated or not, belonging to said defendant corporation within the state of Michigan, and of all books, papers, property, and documents, of any and every description, belonging to said defendant, and with full power and authority to sue in his own name as such receiver, or in the name of the defendant corporation, for all assets, money, or property, and obligations due from residents of the state of Michigan to the defendant.

The suggestion that it was not proved that the foreign insurance company had authority to do business in the state of Michigan is made for the first time in this court, and, we think, should not control the decision.

As to the contention that the premium note was obtained by fraud, this contention is based upon certain papers which were found in the safe of the defendant company by a witness who personally knew nothing of their origin; and there was no evidence to show the manner in which they came into the possession of the defendant, nor was their execution or authenticity proven. Under these circumstances, we are certainly not in a position to say that fraud was conclusively proven.

We think the judgment should be reversed, and a new trial ordered.

Long, C. J., Hooker, and Moore, JJ., concurred.

Grant, J., did not sit.

INSURANCE—MUTUAL BENEFIT SOCIETIES—LAWS GOVERNING—RIGHTS OF MEMBERS.—A policy holder in a mutual insurance company is presumed to know such rules as are contained in the charter and by-laws, but not the business regulations and instructions to agents adopted by the officers of the company: *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664. A contract of insurance in a benefit association should be construed and interpreted according to the laws of the state where the contract was made and to be performed: *Mullen v. Reed*, 64 Conn. 240; 42 Am. St. Rep. 174, and note; monographic note to *Lake v. Minnesota*

etc. Assn., 52 Am. St. Rep. 545, and as to the validity of assessments at pp. 572-574.

APPEAL—OBJECTIONS NOT RAISED BELOW.—An objection not raised at the trial will not be considered on appeal: *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560; *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

BRUSH v. BEECHER.

[110 MICHIGAN, 597.]

PERPETUITIES — COVENANT FOR RENEWAL OF LEASE.—A lease does not create a perpetuity by reason of a covenant for renewal at the option of one of the parties, unless an intention to create such perpetuity appears in clear and unequivocal language upon the face of the instrument.

PERPETUITIES — COVENANT FOR RENEWAL OF LEASE.—A lease for a term of years providing that the lessors, their executors, administrators, or assigns may, at the end of the term, purchase buildings erected by the lessee at a certain fixed valuation, and, if they do not make such purchase, the lease shall continue for a similar term and succeeding terms under the same conditions, and that if the lessee, his executors, administrators, or assigns, do not keep all the conditions of the lease, it shall immediately cease and be utterly void does not provide for renewals beyond the lives of the parties, nor create a perpetuity.

F. A. Butler, for the appellant.

A. Russell, and J. Atkinson, for the appellees.

⁶⁰¹ **GRANT, J.** The material parts of the leases being the same, we will discuss the first lease only. The position of the plaintiff is, that this is a lease for a term of years, with covenants for perpetual renewals, and is equivalent to a demise in fee, and therefore valid. The position of the defendants is: 1. That the lease has ceased and is terminated by the nonpayment of rents; 2. That if it is not so determined, it is void for want of mutuality; 3. That if it be construed as a lease for perpetual renewals, it is void as against public policy; 4. That it was not intended by the original parties to it to be a lease in perpetuity.

There are authorities which hold that such leases are against public policy. In *Morrison v. Rossignol*, 5 Cal. ⁶⁰² 64, the court held that: "A covenant for a lease to be renewed indefinitely at the option of the lessee is, in effect, the creation of a perpetuity. It puts it in the power of one party to renew forever, and is, therefore, against the policy of the law." In principle, there is no difference between an endless succession of five year estates, and an endless succession of life estates, which the

law prohibits. This lease is not a grant in fee, reserving rent, as the Van Rensselaer leases in the state of New York have been held to be: *Van Rensselaer v. Hays*, 19 N. Y. 68; 75 Am. Dec. 278; *Van Rensselaer v. Ball*, 19 N. Y. 100. In the present case, the lease, aside from the clause for renewal at option of lessor, is the usual one for a term of years. The landlord, exercising his option to terminate, limited his liability to pay for buildings and improvements to ten thousand dollars. The land is situated near the center of the business part of a great and growing city. The lessor cannot improve it, and there is no inducement for the lessee to do so. If the lessee should build expensive buildings, it would furnish an inducement for the lessor to terminate the lease; and if the improvements do not amount to that sum, yet another person may be willing to pay more rent, and make an agreement with the lessor to terminate the lease and oust the tenant. It must be conceded that such an arrangement prevents the free use, sale, and circulation of property which is in accord with the spirit of this country. It is clear that this is not an absolute lease for such length of time as, under the New York decisions, amounts to a transfer of the fee, and in no sense restricts or interferes with that use and sale of the land, and the interest of the lessor and lessee, in which the public are rightfully interested. It is, however, unnecessary to discuss this question further, or to determine the validity of a lease which in unequivocal language provides for perpetual renewals. We are of the opinion that this lease does not so provide. In one point the authorities are harmonious, viz., that the law does not ⁶⁰³ favor perpetual leases of the character claimed for this one, and the intention to create one must appear in clear and unequivocal language. It cannot be left to inference. Courts will, if possible, so construe the writing as to avoid a perpetuity by renewal: *Muhlenbrinck v. Pooler*, 40 Hun, 526; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154; 35 Am. Rep. 505; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Piggot v. Mason*, 1 Paige, 412; *Carr v. Ellison*, 20 Wend. 178; *Syms v. Mayor etc.*, 105 N. Y. 153; 50 N. Y. Sup. Ct. 289.

We think it clearly appears "from the four corners of the instrument" that the parties did not intend to provide for perpetual renewals. The writing bound only Mr. Brush, his administrators, executors, and assigns, and Mr. Beecher, his administrators, executors, and assigns. It bound the heirs of neither party: See *Rawle on Covenants*, secs. 309, 310. The learned counsel for the plaintiff appears to recognize this, and admits

that the heirs of Mr. Beecher are not personally bound, but that under 2 Howell's Statutes, sections 5937 and 5940, the heirs of Mr. Beecher are liable only so long as they have assets in their hands which came from his estate. These sections, and other provisions of chapter 224 of 2 Howell's Statutes, refer to contingent claims, and such claims must first be proven against the estate. This necessarily involves keeping the estate open indefinitely—a condition for which the statute does not provide. It is held in Quain's Appeal, 22 Pa. St. 510, that a ground rent covenant does not survive against the administrators, except as to the rents which accrued in the lifetime of the deceased. It is reasonable to hold that the word "heirs" was left out of this lease for the reason that neither party desired to make it binding upon his heirs. It would be absurd to hold that either party understood that he was executing an instrument which would require his estate to be kept indefinitely in the hands of executors. The duty of administrators is to settle estates, and divide them among the heirs. They cannot carry on the business in which the deceased was engaged, except at their ⁶⁰⁴ peril; and, even where a will provides that executors may continue the business of their testator, they cannot be compelled to do so: Williams on Executors, 1762, 1791.

The rent is reserved to the lessor, his administrators, executors, and assigns, and not to his heirs. It is also of some significance that the lease contains no provision for re-entry by the lessor in case of nonpayment of rent, which is usually found in leases, but only in case he shall elect to take the buildings and terminate the lease. The language is, that upon failure to pay the rent the lease shall immediately cease and terminate, and be utterly void, anything to the contrary therein contained notwithstanding. In case of failure to pay rent, the lessee would lose his buildings, for they were a part of the realty: Kutter v. Smith, 2 Wall. 491. If Mr. Beecher had refused to appoint arbitrators to readjust the rent, or if the arbitrators had failed to agree, the lease contains no provision by which the old lease shall stand, or the former rate of rent continue. Mr. Beecher might lose his improvements in the event of his refusal to appoint arbitrators, and Mr. Brush's remedy at law for damages would be ample. Under the authorities above cited, Mr. Brush could not maintain a suit in equity to enforce the specific performance of his contract. We do not think that this contract should be construed to provide for perpetual renewals, or to ex-

tend beyond the lives of the parties to it. It was terminated by their death.

It follows that the judgment must be affirmed.

Montgomery, Hooker, and Moore, JJ., concurred.

Long, C. J., did not sit.

PERPETUITIES — RULE AGAINST—COVENANT FOR RENEWAL OF LEASE.—Before the rule against perpetuities will be applied, it must be clear that a perpetuity exists. When language is fairly capable of two constructions, one of which will produce a lawful result, and the other one that is bad for remoteness, the former should be adopted rather than the latter: *In re Stickney's Will*, 85 Md. 79; 60 Am. St. Rep. 308, and note. In California, a lease for years with a covenant for perpetual renewal was held to be void as an attempt to create a perpetuity, and even in England such a covenant will not be permitted to create a perpetuity: See monographic note to *In re Walkerly*, 49 Am. St. Rep. 134. But although the law discourages perpetuities, and does not favor covenants for continued renewals, yet, when clearly made, their obligation is binding and will be recognized: See monographic note to *Blumenberg v. Myres*, 91 Am. Dec. 566.

IN RE MILLER.

[110 MICHIGAN, 676.]

CONSTITUTIONAL LAW—EX POST FACTO LAW—CREDITS TO CONVICTS FOR GOOD BEHAVIOR.—If a convict has served one term in prison before the enactment of a statute providing that second term convicts shall be entitled to a less favorable reduction of the time of their sentence for good behavior than is allowed to first term convicts, he is subject to the provisions of such statute as applied to the punishment of a crime committed by him after its enactment. Such statute is not *ex post facto* in its operation when so applied.

T. E. Barkworth, for the appellant.

F. A. Maynard, attorney general, for the respondent.

676 MOORE, J. The petitioner is serving his second term in the state prison at Jackson. His first term expired April 19, 1893. His second term began February 10, 1894, and was for three years. Act No. 118, Public Acts of 1893, took effect May 26, 1893. Section 33 of that act provides that convicts who shall have no infractions of the rules of the prison against them shall be entitled to a reduction from their sentences according to a certain scale, with a proviso that a convict who shall be serving a second term in said prison shall be entitled to a less favorable reduction. If the provisions of this act are applied to the peti-

tioner, and he is treated as now serving his second term, his term will not expire until November 16th of this year, but if he is treated as though serving his first term, he is now entitled to his release.

⁶⁷⁷ It is claimed that to regard the petitioner as now serving his second term is to apply *ex post facto* legislation to him, and subject him to additional punishment for a crime which he has fully expiated, under the laws existing at the time of its occurrence. Counsel cites *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 87; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *In re Walsh*, 87 Mich. 466; *In re Canfield*, 98 Mich. 644. We do not think any of these cases sustain the claim of counsel for the petitioner. It is held in *Calder v. Bull*, 3 Dall. 386, that the legislature may declare new crimes, and establish rules of conduct in future cases. In *Fletcher v. Peck*, 6 Cranch, 87, an *ex post facto* law was defined to be one which renders an act punishable in a manner in which it was not punishable when it was committed. The act of 1893 was in force before the second conviction of the petitioner occurred. He is presumed to have known its provisions when he committed the offense for which he is now serving time. He served the penalty of his first conviction, and, if he had not again violated the criminal law, he would not now be an inmate of prison. The penalty he is now serving is imposed for the offense committed by the prisoner after the act of 1893 took effect. Under such circumstances, the act cannot be regarded as *ex post facto*. It was stated in *In re Canfield*, 98 Mich. 648, that: "This is not a case where the law has authorized the imposition of an increased penalty for a second offense, but one where a certain class of offenders are denied the benefits of a certain rule made for the maintenance of good order in the prison."

We think it competent for the legislature to establish such a rule, and that it is not *ex post facto* legislation: See *Cooley's Constitutional Limitations*, 6th ed., 327; *Ross' case*, 2 Pick. 165; *Commonwealth v. Phillips*, 11 Pick. 28; *Plumbly v. Commonwealth*, 2 Met. 413; *Commonwealth v. Marchand*, 155 Mass. 8; *Ex parte Gutierrez*, 45 Cal. 429; *People v.* ⁶⁷⁸ *Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *Blackburn v. State*, 50 Ohio St. 428; *Commonwealth v. Graves*, 155 Mass. 163.

The petitioner is remanded.

The other justices concurred.

Constitutionality of Statutes Imposing a Heavier Penalty for a Second Offense.

There was a time when the sole objects of penal legislation were to eliminate crime by the infliction of penalties, the severity of which was meant to deter possible criminals from committing crimes, and to effectually rid society of the presence of known criminals in its midst. Little attempt was made to distinguish between grades of crime and the death penalty visited the commission of many offenses now punishable by fine or imprisonment. Modern legislation in this field, however, distinguishes minutely the grades of public offenses, and is further framed with the aim not only of punishing criminals, and of preventing crime by making the penalties swift and certain, but also with the aim of reforming criminals into useful citizens. To this latter end there have been great changes in prison management. Rewards for good behavior are placed before the prisoner, either in the form of possible pardon, or of certain reduction in the length of his commitment. He is, theoretically at least, given an environment which encourages proper living. In other words, we endeavor to extirpate crime by educating it out of existence. But there is a large class of habitual criminals who must be dealt with in a different manner, and statutes similar in purpose and effect to that in the principal case have been enacted generally throughout this and other countries in order to deal with them effectively.

"All the states of the American Union, that have adopted the penitentiary system, make provision for the reformation of offenders by increasing the punishment for second and subsequent convictions," says the court in *Long v. State*, 36 Tex. 6. "The main purpose of every human penal code is to prevent the commission of crime. The law does not seek to take vengeance upon its violators. It strives by its penalties to warn and hinder rather than to punish": *Commonwealth v. Daley*, 4 Gray, 209; *Rand v. Commonwealth*, 9 Gratt. 738. These statutes are based upon the principle that it is just that an old offender should be punished more severely for a second offense—that repetition of the offense aggravates the guilt: *Kelly v. People*, 115 Ill. 583; 56 Am. Rep. 184; and it is their aim to enhance the punishment, in proportion as the convict proves himself incorrigible by former punishment: *Plumbly v. Commonwealth*, 2 Met. 413; *Maguire v. State*, 47 Md. 485. The constitutionality of such statutes has been questioned in many of the states, and upon various grounds which will be adverted to in detail herein, but wherever attacked, and upon whatever ground assailed, their constitutionality has been uniformly sustained: *Moore v. Missouri*, 159 U. S. 677; *In re Boggs*, 45 Fed. Rep. 475; *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *Ex parte Gutierrez*, 45 Cal. 429; *Maguire v. State*, 47 Md. 485; *Kelly v. People*, 115 Ill. 583; 56 Am. Rep. 184; *Ross' case*, 2 Pick. 164; *Sturtevant v. Commonwealth*, 158 Mass. 598; *State v. Moore*, 121 Mo. 514; 42 Am. St. Rep. 542; *State v. Wilbor*, 1 R. I. 199; 36 Am. Dec. 245; *State v. Hodgson*, 66 Vt. 134; *In re Miller*, 110 Mich. 676;

ante, p. 376; *People v. McCarthy*, 45 How. Pr. 97; *People v. Sage*, 11 N. Y. App. Div. 4.

Ex post facto Legislation.—We have said that the constitutionality of the class of statutes under consideration has been uniformly sustained when brought in question, but this statement must be slightly qualified in deference to a difference of judicial opinion as to whether or not, upon being applied to certain cases, they may be successfully assailed as *ex post facto* legislation. In many cases where a statute imposes a heavier penalty for second and subsequent offenses, it will happen that one who committed his first offense before the enactment of the statute, commits a second offense after such enactment, and upon conviction thereof the question arises, may the first offense be considered as justifying the imposition of the increased penalty for the later offense? And the further query presents itself, does such an application of the statute give it an *ex post facto* effect? The general nature of *ex post facto* laws is to make acts criminal which at the time when they were done were innocent, and which had not been made an offense by any law: *Ross' case*, 2 Pick. 165. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed: *Fletcher v. Peck*, 6 Cranch, 138, which aggravates a crime and makes it greater than when committed, or which changes the punishment, or inflicts a greater punishment than the law annexed to the crime when committed, or changes the rule of evidence and receives less or different testimony than was required at the time of the commission of the crime in order to convict the offender: *People v. Hayes*, 140 N. Y. 484; 37 Am. St. Rep. 572, and monographic note as to *ex post facto* laws.

It is manifest that where both offenses were committed after the enactment of the statute, its constitutionality cannot be questioned upon this ground; and when both were committed before the adoption of the statute, it is equally patent that such an objection would be effective. When one or more of the convictions were had before, and the last after, the enactment of the statute, it might appear at first blush that to interpret the statute so as to allow the imposition of the increased penalty upon the last conviction would be to give it an *ex post facto* effect, but a consideration of the theory of such legislation must convince one that such is not the case. It cannot be reasonably maintained that such a statute changes the punishment of the first offense, or inflicts upon it a punishment greater than the law annexed to it when committed. The increased penalty is not inflicted upon the first offense, but is intended as punishment for the persistence in crime which subsequent convictions evince: 2 Bishop's New Criminal Law, sec. 965; and elsewhere, 1 Bishop's New Criminal Law, sec. 823, the learned author says: "A statute providing a heavier punishment for a second offense than for the first is not *ex post facto*, even though the first took place before its passage." Such a statute, says Shaw, C. J., in *Plumbly v. Commonwealth*, 2 Met. 413, "imposes a higher punishment for the same of-

fense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed": *Moore v. Missouri*, 159 U. S. 673. The first offense was not an element of, nor included in, the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense": *People v. Raymond*, 96 N. Y. 38. The statute imposes a new penalty distinct from the old: *State v. Wilbor*, 1 R. I. 199; 36 Am. Dec. 245; and the penalty does not attach to the first offense: *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *State v. Moore*, 121 Mo. 514; 42 Am. St. Rep. 542; *Ingalls v. State*, 48 Wis. 647; but to the subsequent one: *Ross' case*, 2 Pick. 164; *Sturtevant v. Commonwealth*, 158 Mass. 598; *Blackburn v. State*, 50 Ohio St. 428; *Ingalls v. State*, 48 Wis. 647; *Rand v. Commonwealth*, 9 Gratt. 738; *People v. Raymond*, 96 N. Y. 38. In holding that convictions prior to the statute may be included, Knowlton, J., in *Commonwealth v. Graves*, 155 Mass. 163, sums up the matter in these admirable sentences: "The statute relates to the judgment to be rendered and the sentence to be imposed in cases arising after it goes into effect. It is prospective and not retrospective. It deals with offenders for offenses committed after its passage, but it provides that in considering the nature of an offense and the condition into which the offender is brought by it, his previous conduct may be regarded. . . . With this construction it is not unconstitutional as an ex post facto law. In punishing offenses committed after its passage, it punishes the offenders for a criminal habit whose existence cannot be proved without showing their voluntary criminal act done after they are presumed to have had knowledge of the statute. Such an act is a manifestation of the habit, which tends to establish and confirm it, and for which the wrongdoer may well be held responsible."

Including Convictions prior to Passage of Statute.—Following the reasoning just laid down, it has been settled by the undoubted preponderance of authority that convictions prior to the passage of statutes of the sort under consideration may be considered as authorizing the infliction of the increased punishment for a conviction subsequent thereto. In *Rand v. Commonwealth*, 9 Gratt. 738, the court, while adhering to this rule, did so because the statute under construction, by its terms demanded such an interpretation, and said: "If a reasonable doubt arose out of the language used in the statute, whether the law contemplated the cases in which the first conviction was had before its passage, the charitable rules which prevail in the construction of such laws would, perhaps, require us to restrict its operation to those cases alone where the first conviction had taken place since the passage of the law." In *Carson v. State*, 108 Ala. 35, it was held that both convictions must follow the passage of the statute. The statute referred to was relative to the sale of intoxicating liquors. It was amendatory of previous prohibition statutes, and expressly repealed all penalties prescribed in all other prohi-

bition statutes of Lowndes county as to all offenses thereafter committed, its object being "to prescribe a uniform penalty for the violation of a prohibition law wherever occurring in the county." The defendant under indictment for violating this statute was shown to have been twice convicted previously of a similar offense, the convictions occurring before the passage of the statute. The supreme court in reviewing the instructions of the trial court that the defendant, if convicted of the offense charged, was liable to the maximum fine prescribed for second and subsequent convictions, held them to be erroneous, since the statute only contemplated cases in which the prior conviction followed the enactment of the statute. The case of *State v. Sanford*, 67 Conn. 286, has also been cited as opposed to the rule above stated, but in it the issue was not squarely presented. The act under which the last conviction was had provides that any person convicted of a first violation of the liquor law shall be fined not less than ten dollars nor more than two hundred; and for a second and all subsequent convictions shall be punished by said fine, or by imprisonment not less than ten days nor more than six months, or by such fine and imprisonment both. The act further provided that these penalties should be in lieu of those hitherto prescribed by law. The former conviction of the appellant was prior to the passage of the act, and it was held that inasmuch as the punishment provided by the first clause of the act for a first violation was greater than that previously prescribed, and would thus be *ex post facto* if applied to offenses committed before it went into effect, the entire act must be construed as applicable only to offenses committed after the act took effect, and to convictions secured for such offenses only. Excepting these cases, none has come under our notice which in effect questions the proposition laid down at the opening of this paragraph, which is supported by a strong array of authority: *Ex parte Gutierrez*, 45 Cal. 429; *Ross' case*, 2 Pick. 165; *Commonwealth v. Graves*, 155 Mass. 163; *Commonwealth v. Marchand*, 155 Mass. 8; *In re Miller*, 110 Mich. 676; *ante*, p. 376; *People v. Raymond*, 96 N. Y. 38; *Blackburn v. State*, 50 Ohio St. 428; *Rand v. Commonwealth*, 9 Gratt. 738.

Twice in Jeopardy for Same Offense.—Another objection to the constitutionality of these statutes which has been urged with futile persistency is that they put the accused twice in jeopardy for the same offense, and are, therefore, unconstitutional. This objection was dismissed as "hardly worthy of serious consideration" by Davis, J., in *People v. McCarthy*, 45 How. Pr. 97, and has been overruled in many cases where interposed. It is invalidated by the same reasoning applied above to the objection that such statutes are void as *ex post facto* legislation. Such statutes create a new and distinct offense of which the first offense forms no part. They impose no new punishment for the first offense, because the increased punishment attaches exclusively to the offenses subsequent to the first. An accused person is punished but once for his first offense, and cannot be considered as again put in jeopardy when his former conviction

is merely considered as evidence of a persistency in crime for which he is properly held responsible, and which is the essence of the offense for which the increased penalty is prescribed: *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *Kelly v. People*, 115 Ill. 583; 56 Am. Rep. 184; *State v. Moore*, 121 Mo. 514; 42 Am. St. Rep. 542; *People v. Bosworth*, 64 Hun. 72; *Moore v. Missouri*, 159 U. S. 673; *Ingalls v. State*, 48 Wis. 647; 1 Bishop's New Criminal Law, sec. 965; *In re Boggs*, 45 Fed. Rep. 475.

Cruel and Unusual Punishments—Equal Protection of Laws.—Other objections have been raised to the constitutionality of these statutes with no better success than has attended those already noticed. State constitutions generally contain provisions prohibiting the imposition of "cruel and unusual punishments," or punishments not proportioned to the nature of the offense, and statutes similar to that in the principal case have been attacked as violating such provisions. It is easy to imagine cases in which this objection would be effective, for such provisions have a definite and important purpose, but in the cases thus far considered by the courts it has been overruled. In *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401, the court said, per Crockett, J.: "But no case has been called to our attention, nor have we been able to find one, in which it was held that statutes of this character are amenable to the objection now so earnestly urged by counsel," which objection was the one now under consideration. For similar holdings see *State v. Moore*, 121 Mo. 514; 42 Am. St. Rep. 542; *Kelly v. People*, 115 Ill. 583; 56 Am. Rep. 184; *Moore v. Missouri*, 159 U. S. 673; *State v. Hodgson*, 66 Vt. 134; *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477, where the statute in question imposing a fine of not less than five thousand, nor more than ten thousand dollars for a second violation of the statutory schedule of through rates of transportation upon railroads, was held constitutional. Nor have such statutes been held unconstitutional under the fourteenth amendment of the constitution of the United States, which prohibits any state from depriving persons of life, liberty, or property without due process of law." It has been urged that the result is to punish ex-convicts more severely for the same offenses than those not ex-convicts, but such statutes do not discriminate between persons of whatever class who commit the acts prohibited thereby: *State v. Hodgson*, 66 Vt. 134; *In re Boggs*, 45 Fed. Rep. 475; *Moore v. Missouri*, 159 U. S. 673. In the last case cited, Fuller, C. J., thus disposes of this objection: "The general doctrine is, that that amendment, in respect to the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; . . . and the state may undoubtedly provide that persons who have been convicted of crime may suffer severer punishment for subsequent offenses than for the first against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated."

VAN CLEVE GLASS COMPANY v. ERRATT.

[110 MICHIGAN, 689.]

MECHANICS' LIENS—MATERIALMEN.—One who sells building material to a dealer in the usual course of trade, without any knowledge or understanding that it is to enter into any particular building, is not entitled to a lien on the building in which it is used. There is no contract relation between the seller and the owner of such building.

H. G. Dozer, for the appellant.

Frost & Sprague, for the appellee.

⁶⁸⁹ GRANT, J. The defendant Kessler, in the summer of 1894, erected a store building upon his land in Cheboygan. One Tuttle was employed by him to superintend the erection of the building, and to purchase materials ⁶⁹⁰ for its construction. Defendants Erratt and Hughes were copartners, under the firm name of Erratt & Co., engaged in the retail hardware business in Cheboygan. Complainant was a corporation, organized under the laws of Ohio, and engaged in the business of wholesaling plate and window glass in Cleveland, in that state. Tuttle ordered of Erratt & Co. plate glass designed to be used in the building for two hundred and ten dollars. Erratt & Co. purchased the glass of the complainant for one hundred and ninety-two dollars, free on board at Cheboygan. Both orders were given in the usual course of trade. In giving the order to complainant, Erratt & Co. did not state that it was intended for any particular building. On October 17th the building was ready for the glass, which had not then been shipped. Erratt & Co., on that date, wrote complainant to push the order as rapidly as possible, "as the building is now waiting for it." The glass was shipped to Erratt & Co. soon after, and, upon its arrival, Kessler paid Erratt & Co. the agreed price. In November following, Erratt & Co. failed, whereupon the complainant instituted this suit to enforce a mechanic's lien for material furnished. Upon the hearing, a decree was entered dismissing the petition.

There was no contract relation between complainant and Kessler. It sold the property in the usual course of trade, without any knowledge or understanding that it was to enter into any particular building. The lien statute of this state does not cover such a case: *Willard v. Magoon*, 30 Mich. 273; *Stout v. Sawyer*, 37 Mich. 313; 15 Am. & Eng. Ency. of Law, 56.

The decree is affirmed, with costs.

The other justices concurred.

MECHANIC'S LIEN—RIGHT OF MATERIALMAN TO.—The mechanic's lien law contemplates a contract or agreement more specific than an ordinary sale of materials. If a materialman sells his materials without any understanding as to their application, he can assert no lien upon the building upon which they may be used. Equally fatal to the lien is it that the materials were furnished exclusively upon the credit of the contractor, for the transaction then is an ordinary sale to the contractor, out of which no lien can arise. It is necessary that the materials be furnished for the specific purpose named in the statute: See monographic note to Chapin v. Persse etc. Paper Works, 79 Am. Dec. 271, 272. Purchase of materials on an open general account does not create a lien, where there is no reference to their being used in any particular building: Hill v. Bishop, 25 Ill. 349; 79 Am. Dec. 333; Duncan v. Bateman, 23 Ark. 327; 79 Am. Dec. 109.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

KIMM v. GRIFFIN.

[67 MINNESOTA, 25.]

PARTY-WALLS—AGREEMENT—COVENANTS RUNNING WITH THE LAND.—Contracts with reference to party-walls should be construed with a view to carry out the purpose and intent of the parties. If two adjoining owners, therefore, enter into a contract by which one agrees to build a party-wall, and the other covenants to pay his proportion when he uses it, but it is agreed, for the mutual benefit of the parties, that, in all deeds and transfers, the wall shall be reserved as a partition wall, that it shall be kept in good condition and repair at the expense of both parties, each paying share and share alike, and that the wall and the conditions imposed are to be permanent—such contract is not merely a personal one between the parties, but benefits and burdens arise from such covenants, are inseparably connected therewith, and necessarily pass, according to the manifest intention of the parties, to a grantee of the land. Hence, such covenants run with the land and do not give a cause of action, upon a breach thereof, in favor of one of the owners who has parted with his interest in the land.

Action to recover on a party-wall agreement. A judgment was directed for the defendant, and Kimm, the plaintiff, appealed.

Ernest Otte, for the appellant.

W. H. DeKay, for the respondent.

²⁶ **BUCK, J.** Action to recover one-half of the cost of a party-wall erected under a sealed agreement. The stipulated facts are as follows:

"First. That on the 17th day of November, 1869, the plaintiff was the owner in fee of the middle one-third of lot one (1), block thirteen (13), in the city of Hastings, and described in the com-

plaint in this action, and that one Peter Smith was the owner in fee of the west one-third of said lot one (1), block thirteen (13), which adjoins said middle one-third of said lot one on the west. Second. That on said 17th day of November, 1869, said Theodore Kimm and said Peter Smith, their wives joining, executed the party-wall agreement referred to in said complaint, a copy of which is attached thereto and made a part hereof. Third. That subsequent to the execution of said party-wall agreement, and in or about the spring of 1870, said Theodore Kimm erected a two-story brick building, eighty feet in length, the west wall of which was twelve inches in thickness; one-half thereof, or six inches, resting on the west one-third of said lot one (1), and the other half, or six inches thereof, resting upon the middle third of said lot one. Fourth. That said Theodore Kimm and wife, on the 27th day of January, 1876, conveyed by warranty deed the said middle one-third of said lot one (1), to one Marcus Marx, a copy of which is hereby attached, referred to, and made a part hereof, marked 'Exhibit B.' Fifth. That on the 15th day of July, 1895, said Marcus Marx conveyed by warranty deed to defendant herein, Patrick Griffin, the said middle one-third of said lot one (1), a copy of which is hereby attached, marked 'Exhibit C,' and made a part hereof. Sixth. That on the 12th day of June, 1895, said Peter Smith and wife, Barbara, conveyed by warranty deed to the defendant herein the west one-third of said lot one (1), a copy of which is hereby referred to, marked 'Exhibit D,' and made a part hereof. Seventh. That before the commencement of this action the defendant erected a two-story brick building on said west one-third of said lot one (1), extending the entire length of the west wall, or 'party-wall,' above mentioned, joining the same to the building heretofore mentioned, and built on said middle one-third of said lot one (1), and occupied the same, and in doing so used said party-wall as the east wall thereof. Dated at Hastings, Minn., Apr. 29th, 1896."

Upon these facts the trial court ordered that judgment be entered in favor of the defendant.

²⁷ Griffin, the defendant, at the time of the commencement of this action, owned the entire property, having purchased the title to the middle one-third of lot 1 from the Marcus Marx to whom Kimm had conveyed it, and the west one-third of lot 1 defendant had purchased from Peter Smith. All the conveyances were by warranty deeds. On the seventeenth day of November, 1869, Kimm and wife entered into an agreement with

Smith and wife, stating therein that Kimm was about to erect a two-story building upon his lot adjoining Smith's and that if he (Kimm) should erect a good and substantial twelve inch wall, eighty feet long north and south, extending six inches on the east side of Smith's lot, then Smith would, for so much of said party-wall as he might use, pay Kimm one-half the cost thereof as soon as the building should be completed and occupied by said Smith. Griffin's acts in the premises are stated in the seventh subdivision of the facts stipulated. By the terms of the agreement the party-wall was to be kept in good condition and repair by each party paying share and share alike. All of the stipulations were to apply to and bind the heirs, assigns, executors, and administrators of the respective parties. It was also stipulated that in all deeds and transfers said party-wall should be reserved as such for the mutual benefit of the parties.

The evident meaning of these stipulations is, that the building of the party-wall should not be limited to the parties making them, or during their ownership of their respective premises, but that whoever should succeed to the estates, either their heirs or assigns, should have the same rights and liabilities under the agreement as their predecessors had or might have. If Kimm did not build the wall, and should convey his premises, and his grantee or any subsequent grantee built the wall, then he would have the right to recover the expense thereof from Smith if he still owned the premises and built and occupied the party-wall, and, if not, then from his grantees or subsequent grantees of the premises who built and used the wall under the agreement. Each adjoining owner would have an easement in that portion of the party-wall owned by the other, and the agreement creates mutual covenants running with each lot. It is under seal, duly acknowledged and recorded. That it does not, in express terms, contain covenants running with the land, is not material. It does create an easement in favor of each respective lotowner ²⁸ and his successors in interest in the one-half of the wall which stands on the other lot. Benefits and burdens therefore arise from the covenants contained in the agreement, and are inseparably connected therewith. There was a joint easement in the wall the moment it was built, and Smith's liability to the extent of one-half the cost arose as soon as it was completed, if he still owned the premises, and erected a dwelling and occupied half of the wall.

But to whom was he liable? Not to Kimm, as he had, at the

time this action was brought, parted with his title, and no longer had any interest in the lot or party-wall, and his conveyance contained no reservation of right to recover half the expense of building the wall. When he conveyed his title he was no longer under any legal obligation to keep the wall in repair jointly with the other owner if he should build and occupy the wall according to the agreement. This right of either party to enforce this stipulation as to keeping the wall in good condition and repair, and thus rendering either party liable to perform it, must necessarily pass to the assignee of the lot. The agreement has direct reference to the lots, and is beneficial to the respective owners as owners, and not to third persons. The purchaser bought with the presumption, if not absolute assurance, that in making the purchase he was to enjoy all the benefits received, and be liable for all the obligations incurred.

Such must have been the intention of the parties, for by the very terms of the stipulations the party-wall and conditions imposed were to be permanent. The right was not exercised until more than twenty-five years after the date of the agreement, and the erection of the building by Kimm, nor until both of the original parties to the agreement had conveyed their respective lots; and each lot so conveyed was subject, under the agreement, to a burden for the benefit of the adjoining premises. The obligations of the parties under the stipulation were not to cease with the mere erection of the building and occupation of the party-wall, but such burden was to be continuous, so long, at least, as the building endured, and the wall was occupied by the parties or their successors.

If Kimm had not erected the building and occupied the party-wall, Marx, as his grantee, or Griffin, as the grantee of Marx, would have had the right to do so under the stipulation which provides that it shall apply to Kimm's assigns. Griffins, the defendant, was the last ²⁹ grantee holding under the mesne conveyances, and with this right was the corresponding obligation to repair the party-wall and keep it in good condition. He was also the grantee of Smith. But as he had the title to both lots, the burdens and benefits merged in him, and therefore he had no cause of action against anyone, and was liable to no one else, because, from the language, and intent to be gathered from the original agreement, we think that the covenant ran with the land, and that Kimm and Smith did not intend a merely personal contract between themselves. Certainly, contracts with reference to party-walls should be construed with a view to carry

out the purpose and intent of the parties. A party-wall is for the common benefit of both tenements which it supports, and either owner can use it for the purpose contemplated by the agreement for its erection and subsequent use.

This view of the case leads to the conclusion that Kimm has no cause of action against Griffin upon the agreement. It was not merely a personal contract between him and Smith. Having parted with all his interest and title in the lot owned by him at the time of the agreement, he was no longer liable under the stipulations to make repairs on the party-wall, nor keep it in good condition, nor entitled to any subsequent benefits from the erection and use of the wall by his or Smith's successors. In some jurisdictions it is ruled differently, while in others the rule is that the covenants run with the land. Of the latter class of cases are the following: *King v. Wight*, 155 Mass. 444; *Richardson v. Tobey*, 121 Mass. 457; 23 Am. Rep. 283; *Platt v. Eggleston*, 20 Ohio St. 414.

"A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land to which the covenant is attached": *Savage v. Mason*, 3 Cush. 500.

Construing the agreement and the warranty deeds together, it seems to us clear that the covenant in regard to the party-wall must be deemed to run with the land, and that a personal action by K. against G. is not enforceable.

Judgment affirmed.

ON APPLICATION FOR RE-ARGUMENT.

PER CURIAM. Appellant asks a reargument on the ground that the decision herein overrules *Pillsbury v. Morris*, 54 Minn. 492, which has, it is claimed, become a rule of property. Notwithstanding what was said in the opinion, the *Pillsbury* case was correctly decided upon its special facts, which were that the person erecting the party-wall expressly reserved his right to enforce payment for one-half of the cost of the wall, when he assigned his lease of the land on which one-half the wall stood. In this respect the case is distinguishable from the one at bar.

PARTY-WALLS—COVENANTS RUNNING WITH THE LAND.
A covenant to pay the owner of an adjoining lot one-half the cost of a party-wall erected by him when the covenantor shall use the wall is a personal covenant, and does not pass to the grantee of the cove-

nantee: Bloch v. Isham, 28 Ind. 37; 92 Am. Dec. 287; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611. Contra, Richardson v. Tobey, 121 Mass. 457; 23 Am. Rep. 283; Sharp v. Cheatham, 88 Mo. 498; 57 Am. Rep. 433; note to Everett v. Edwards, 14 Am. St. Rep. 469. See discussion of this question in the monographic note to Bloch v. Isham, 92 Am. Dec. 301-304, on the law of party-walls.

FALL v. YOUMANS.

[67 MINNESOTA, 83.]

NEGOTIABLE INSTRUMENTS—GUARANTY FOR COLLECTION—ACTION—BURDEN OF PROOF.—If a note is executed in a sister state, by a resident of that state, and the collection of it is guaranteed in this state, but the maker removes from that state into another before the note falls due, the holder here may resort to his action on the guaranty without pursuing the maker, and all that is necessary for him to prove is, that the maker left such sister state before the maturity of the note. If the maker left any property in that state out of which the note might be collected, the burden is on the defendant guarantor to prove it.

Action on a guaranty for the collection of a note. The plaintiff, Fall, appealed from an order denying a motion for a new trial.

Alvord C. Egelston, for the appellant.

Harrison & Noyes, for the respondent.

⁸³ MITCHELL, J. In November, 1893, at Neilsville, Wisconsin, a Mrs. Rodman executed to defendant a promissory note, payable eighteen ⁸⁴ months after date, no place of payment being specified. In September, 1894, in the state of Minnesota, the defendant sold and transferred the note to plaintiff's assignor, and at the same time guaranteed its collection. When the plaintiff rested the court dismissed the action.

Objection is made to the sufficiency both of the complaint and of the evidence, but both involve the same question. The complaint alleged that at the time the note was executed the maker was a resident of Wisconsin, but that before the maturity of the note she removed to the state of Illinois, where she has ever since resided; but it did not allege that she had no property in the state of Wisconsin. The defendant, in his answer, alleged that at the time he transferred the note the maker was, and still continued to be, a resident of the state of Illinois. Upon the trial the plaintiff introduced evidence that at the time of the transfer of the note and the execution of the guaranty, the defendant represented to him (acting as agent for his mother and assignor

in the transaction) that the maker was then a resident of Wisconsin. This admission of defendant was evidence against him that the maker was still a resident of Wisconsin; and, even if she had in fact already removed from that state, yet if the note was purchased and defendant's guaranty accepted in reliance on defendant's statement, the rights and liabilities of the parties must be determined on the basis of its truth.

Further than this, the fact that the note was executed in Wisconsin raised a presumption that the maker was a resident of that state at the time it was executed: *Herrick v. Baldwin*, 17 Minn. 183 (209); 10 Am. Rep. 161. The presumption would be, and the plaintiff would have a right, in the absence of notice to the contrary, to assume, that the maker still continued to be a resident of that state. The guaranty must be interpreted in reference to the situation and condition of the maker of the note, actual or rightfully assumed, at the time the guaranty was made. Hence, it would make no difference in the rights and obligations of the parties whether the note was purchased in reliance upon the express statements of the defendant that the maker was still a resident of Wisconsin, or on the assumption, in the absence of notice to the contrary, that she still continued to reside in that state.

Taking the evidence in connection with the admission in the answer,⁸⁵ the plaintiff sufficiently proved that the maker of the note had, before its maturity, permanently removed from the state of Wisconsin, and taken up her residence in the state of Illinois; but he introduced no evidence that she did not have property subject to attachment in the state of Wisconsin, and it was on this ground that this court dismissed the action.

This raises the only question in the case, viz., Was it necessary that the plaintiff should allege and prove, not only that the maker had removed from Wisconsin, but also that she had no property in that state subject to attachment? It is well settled that, if the maker had continued to be a resident of Wisconsin, the plaintiff would have been required to proceed against her in that state, or prove that such proceedings would have been fruitless, before pursuing the guarantor. The fact that the guaranty was executed in Minnesota is not material. It is equally well settled that if, at the time of the maturity of the note, the maker had removed from the state of Wisconsin, and taken up her residence in another state, the plaintiff would not be bound to follow her into the latter state before suing the guarantor. If, however, it had appeared on the trial that, notwith-

standing the removal of the maker from the state of Wisconsin, she still had property in that state out of which the note could be collected, in whole or in part, this would have been a good defense in abatement of this action. But the question is, On which party is the burden of proof? Must the plaintiff prove that the maker has no property in that state, or must the defendant prove that she has?

It is more important that the rules of law in relation to commercial paper should be definite and fixed than that they should be strictly and logically correct on principle. And if a rule be once fully settled by the authorities it ought to be adhered to, even if incorrect in principle. We have not found, nor have counsel referred us to, any case directly in point, on either side of this question, except *White v. Case*, 13 Wend. 543, which, it must be admitted, is an authority in favor of the defendant. It is to be noted, however, that the particular point here involved, and upon which the decision of that case was made to turn, does not seem to have been raised or discussed by counsel. The question is not discussed at all by the court, and, while the case has been frequently cited with approval on other points, we do not find that it has ever been cited to the particular question now ⁸⁶ before us. Edwards and Randolph apparently indorse the doctrine of *White v. Case*, 13 Wend. 543, but cite no other authority supporting it: See Edwards on Bills and Notes, 3d ed., sec. 335; 2 Randolph on Commercial Paper, sec. 890. It is worthy of note that, while Daniel cites the case to another point, he is conspicuously silent upon the question involved here: Daniel on Negotiable Instruments, sec. 1769 a.

Upon this state of the authorities, we feel at liberty to treat the question as one of first impression, and decide it in accordance with what we deem correct principles. In the first place, it is inconvenient, in practice, to require a plaintiff to prove a negative in such cases. The guarantor is presumably better acquainted with the financial condition of the maker than the transferee of the note is, and, if the maker has property in the state from which he has removed, he ought to be able to show it. In the next place, there is no presumption that a man has property in a jurisdiction other than the one in which he resides. In fact, the law usually proceeds on just the contrary presumption. Suppose, for example, the maker of this note had continued to reside in Wisconsin; all that plaintiff would have been required to prove in order to maintain an action against the defendant, would be the rendition of judgment in that state

against the maker, and the issue and return of an execution unsatisfied in the county where she resided. If she had property in any other county in that state, it would have devolved on the defendant to prove it. But why should a different presumption obtain when she has removed to another state, and a presumption be indulged in that she has property, not merely in a county, but in a state, other than the one in which she resides? We are not prepared to say that there may not be cases where the circumstances under which the party left the state might be such as to indicate only a temporary absence, and to raise a presumption that he left his property behind him; but in this case the fact appears that the maker of the note has permanently removed from the state, and taken up her place of residence in another state.

Our conclusion is, that all that it was necessary for plaintiff to prove was that the maker had removed from the state of Wisconsin; that, if she left any property in that state, the burden was on the defendant to prove it.

Order reversed, and new trial granted.

Guaranty of Collection.

Definition and Nature of Undertaking.—A contract whereby one agrees to pay a debt if the creditor cannot, by due diligence, collect it, is a guaranty of collection: *Crane v. Wheeler*, 48 Minn. 207. It is a very different contract from a guaranty of payment: *Shepard v. Phears*, 35 Tex. 763; *Evans v. Bell*, 45 Tex. 553. The distinction between a guaranty of payment and a guaranty of collection is, that the former is an absolute, unconditional undertaking on the part of the guarantor that the debtor will pay upon the maturity of the debt, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor: *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 41; *Day v. Elmore*, 4 Wis. 190. The mere neglect of the creditor, such as the holder of a promissory note, to pursue a remedy against the maker, would not discharge a guarantor of the payment of the note: *Osborne v. Gullikson*, 64 Minn. 218; but a guaranty of the collection of a note is no more than a guaranty that, with proper diligence, the note can be collected, at its maturity, or within a reasonable time thereafter: *Shepard v. Phears*, 35 Tex. 763; *Day v. Elmore*, 4 Wis. 190. If an investment company sells and transfers an obligation secured by mortgage, and agrees, by indorsement thereon: "1. To guarantee the payment of the coupons attached hereto at the maturity thereof; 2. To collect, at its own expense, and to pay over the principal hereof at maturity, provided the same is paid by the maker; 3. In event of default being made by the maker, to collect at its own expense, and to pay over the principal hereof, within two years from maturity of the same," with interest, this is a guaranty, not of collection

merely, but of payment: *New York etc. Trust Co. v. Lombard Inv. Co.*, 73 Fed. Rep. 537, 541; and a guaranty indorsed on a promissory note in the following words: "For value received, I guarantee the payment and collection of the within note, with costs, if any made," is a guaranty both of payment and collection. The holder, in such case, may elect to proceed first against either the maker or the guarantor. If he proceeds against the maker without success, he still has a remedy against the guarantor, not only for the debt but for the costs of the former action: *Tuton v. Thayer*, 47 How. Pr. 180.

One who guarantees the collection of a debt, such as that evidenced by a promissory note, agrees to pay the debt in case it cannot be collected out of the principal debtor by the exercise of due and reasonable diligence, which usually requires a resort to the ordinary course of the law, where payment is not made, and which consists in obtaining judgment, issuing execution, and having it returned unsatisfied: *Dewey v. Clark Investment Co.*, 48 Minn. 130; 31 Am. St. Rep. 623; *Sawyer v. Haskell*, 18 How. Pr. 282; *Forbes v. Rowe*, 48 Conn. 413; *Summers v. Barrett*, 65 Iowa, 292; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Peck v. Frink*, 10 Iowa, 193; 74 Am. Dec. 384; *Voorhies v. Atlee*, 29 Iowa, 49, 51. A guarantor for the collection of a note is liable as upon a promise to pay upon condition that the payee shall diligently prosecute the maker without success: *Jenkins v. Wilkinson*, 107 N. C. 707; 22 Am. St. Rep. 911.

A guaranty that a demand is collectible is a conditional promise, binding upon the guarantor only in case of diligence; and, in case of a guaranty, the obligation to prosecute the principal debtor within a reasonable time, and with due diligence, is a condition precedent to the liability of the guarantor: *Van Derveer v. Wright*, 6 Barb. 547; *Gallagher v. White*, 31 Barb. 92; *Burt v. Horner*, 5 Barb. 501; *Taylor v. Bullen*, 6 Cow. 624; *Thomas v. Woods*, 4 Cow. 173; *Newell v. Fowler*, 23 Barb. 628; *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44; *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; *Lemmon v. Strong*, 55 Conn. 443.

If the payee of a negotiable note indorses it as follows: "I hereby guarantee the collection of the within at maturity," he only guarantees that if the note cannot be collected of the maker by due legal proceedings he will be responsible. In such case the guaranty of collection implies that the holder of the note will make a diligent attempt toward enforcing its collection: *Peck v. Frink*, 10 Iowa, 193; 74 Am. Dec. 384. "I guarantee the within note good till paid," is a conditional guaranty, meaning that the note is capable of being collected by the use of ordinary diligence: *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44. If a note payable on demand is guaranteed by the following indorsement: "I hereby warrant the within note good and collectible until paid," the guaranty is conditional and not absolute, requiring due diligence for the collection of the note: *Lemmon v. Strong*, 55 Conn. 443. A guaranty of the collection of

the amount of a debt, as "it becomes due," is but an undertaking on the part of the guarantor that the debt will be paid, if the principal is prosecuted with reasonable diligence: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469. "I warrant this note good," indorsed by a payee upon a note, is a guaranty that the note is collectible, not that it will be paid on demand: *Curtis v. Smallman*, 14 Wend. 231. A guaranty that "if the bearer fails to collect the above amount by 1st of April, I will be responsible for it," is a guaranty that the claim is collectible: *Evans v. Bell*, 45 Tex. 553. "I guarantee the collection of this note to G. L.," is equivalent to a guaranty that the note is collectible "by due course of law": *Cumpston v. McNair*, 1 Wend. 457. A guaranty that a promissory note "is good" is, in law, a contract that the maker is solvent, and that the amount can be collected by "due course of law": *Cooke v. Nathan*, 16 Barb. 344. The legal effect of a guaranty, indorsed on a promissory note, in these words: "We guarantee the collection of the within note," is the same as if it read: "We guarantee the collection of the within note 'by due course of law':" *Burt v. Horner*, 5 Barb. 501.

Requirements as to Suit.—The general rule is, that a guaranty of collection cannot be enforced against the guarantor until legal proceedings to collect have been instituted and proved ineffectual, or some legal excuse is shown why such proceedings have not been instituted, and they must be prosecuted with reasonable diligence after the maturity of the debt, if payment is not made. To charge the guarantor on a guaranty of collection, it is necessary to show that payment cannot be enforced against the debtor: *Curtis v. Smallman*, 14 Wend. 231; *Bosman v. Akeley*, 39 Mich. 710; 33 Am. Rep. 447; *Mosier v. Waful*, 56 Barb. 80; *Cumpston v. McNair*, 1 Wend. 457; *Evans v. Bell*, 45 Tex. 553; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Summers v. Barrett*, 65 Iowa, 292; *Allen v. Rundle*, 50 Conn. 9; 47 Am. Rep. 599; *Cady v. Sheldon*, 38 Barb. 103; *Newell v. Fowler*, 23 Barb. 628; *Turley v. Hodge*, 3 Humph. 72; *Taylor v. Bullen*, 6 Cow. 624; *Gallagher v. White*, 31 Barb. 92. Thus, the obligation assumed by the holder of a note, upon which a guaranty of collection is indorsed, is, that in case the note is not paid at maturity, he will, within a reasonable time, and with due diligence, institute legal proceedings against the maker for the collection of the note, and prosecute them to consummation, without delay: *Burt v. Horner*, 5 Barb. 501; and a plaintiff holding an indorsed note, with a guaranty of collection written thereon, must show a diligent attempt to collect, both as against the indorser and maker before he can resort to the defendant on his guaranty: *Moakley v. Riggs*, 19 Johns. 69; 10 Am. Dec. 196; *Loveland v. Shepard*, 2 Hill, 139.

If the maker of a note, the collection of which has been guaranteed, absconds and goes to a foreign country, leaving property in this state liable to the payment of the debt, the holder of the guaranty must first exhaust such property before suing the guarantor; and, if he obtains an order of court directing service of the summons

by publication, a compliance with such order is necessary to complete the service of the process, and to give the court jurisdiction of the action. Without such compliance, the subsequent proceedings, and a judgment entered thereon, are void as against the guarantor: *Mosier v. Waful*, 56 Barb. 80. There is a material difference between a failure to prosecute the principal debtor altogether, and neglect to prosecute him within a reasonable time, and with due diligence. A "reasonable time" is not, of course, a definite time, but must always depend upon the particular circumstances of the case presented: *Gallagher v. White*, 31 Barb. 92. The holder of a guaranty is not only bound to institute a suit, within a reasonable time, against the principal debtor, after the latter's default in making payment, but also to conduct the suit to a consummation with reasonable diligence: *Burt v. Horner*, 5 Barb. 501. The time within which the holder of a guaranty is bound to proceed against the principal debtor depends upon the circumstances of each particular case, but must be a reasonable time: *Day v. Elmore*, 4 Wis. 190; *Gallagher v. White*, 31 Barb. 92. Upon the debtor's failure to pay at maturity, mere delay to prosecute is not, of itself, sufficient to negative the use of due diligence, but, if long continued, a presumption is raised of a want of diligence: *Day v. Elmore*, 4 Wis. 190. "The general rule in regard to one who becomes the guarantor of the collection of a demand is, that in so doing he undertakes that the claim is collectible by due course of law, and the guarantor only promises to pay when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the principal, and the endeavor to so collect is a condition precedent to a right of action against the guarantor. And the fact of insolvency is no excuse for the failure to prosecute": *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371. See, also, *Dillman v. Nadelhoffer*, 160 Ill. 121. As to insolvency, see subhead, "Diligence," infra.

Diligence.—As we have seen, the holder of a guaranty for collection is charged with diligence: *Tobin Canning Co. v. Fraser*, 81 Tex. 407; *Dillman v. Nadelhoffer*, 56 Ill. App. 396; 160 Ill. 121; *Jenkins v. Wilkinson*, 107 N. C. 707; 22 Am. St. Rep. 911; *Summers v. Barrett*, 65 Iowa, 292; *Voorhies v. Atlee*, 29 Iowa, 49, 51; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Day v. Elmore*, 4 Wis. 190; *Moakley v. Riggs*, 19 Johns. 69; 10 Am. Dec. 196; but the authorities are not uniform upon the question of what constitutes "due diligence." Perhaps this diversity may be explained by the fact that what constitutes due diligence, in cases of guaranty for collection, depends, of necessity, very much upon the statutes of the states, which are variant, and upon the practice which has grown up in the courts. The question, therefore, is rather one of local jurisprudence than one of general commercial law: *Daniel on Negotiable Instruments*, 4th ed., sec. 1769 a; notes to *Camden v. Doremus*, 3 How. 515. The general understanding is, that due diligence on the part of one who holds a guaranty for collection requires him, ordinarily, to exhaust

his legal remedy against the principal debtor; and by this is meant that the usual and customary legal proceedings should be resorted to, viz., a judgment and execution against the party primarily liable to pay. If such proceedings have been prosecuted without effect, there is no want of diligence and resort may be had to an action on the guaranty: *Dillman v. Nadelhoffer*, 56 Ill. App. 396; 160 Ill. 121; *Thomas v. Woods*, 4 Cow. 173; *Cady v. Sheldon*, 38 Barb. 103; *Forest v. Stewart*, 14 Ohio St. 246; *Tracy v. State*, 44 Tex. 9; *Dyer v. Gibson*, 16 Wis. 557; *Foster v. Barney*, 3 Vt. 60. Thus, due diligence, generally, and in the absence of any special facts, would require suit to be instituted at the first regular term of court after maturity, and the obtaining of a judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court; and, in case of failure to do so, the guarantor is discharged when it appears that the debtor was solvent and that the debt could then have been collected of him: *Voorhies v. Atlee*, 29 Iowa, 49, 51; *Kies v. Tift*, 1 Cow. 98; *Durand v. Bowen*, 73 Iowa, 573; *Dillman v. Nadelhoffer*, 56 Ill. App. 396; 160 Ill. 121. An appellate court will not, in order to fasten liability upon the guarantor of a note, consider whether the holder of the guaranty used due diligence, if no proposition was submitted to the trial court preserving that question as one of law: *Dillman v. Nadelhoffer*, 160 Ill. 121.

One who holds a warranty of collection of a note is not excused from making an attempt to collect it by the fact that the maker died testate, before the note fell due, and that no one had taken out letters of administration upon his estate: *Taylor v. Bullen*, 6 Cow. 624; nor is it any excuse for not attempting the collection of the note of a third person which has been sold and transferred, with a guaranty of collection; that thirty-one months after the transfer the guarantor gave notice to the transferee that he would not be liable for costs which might be incurred in any attempt to collect the note, where it appears affirmatively, upon the showing made by the holder of the guaranty, that he was, before the expiration of that time, guilty of laches: *Eddy v. Stantons*, 21 Wend. 255. The principle that diligence is required of the creditor, in cases of guaranty for collection, is the same as that applied in cases where a plaintiff is required to exhaust his legal remedies against original wrongdoers before resorting to a remedy against others whom he seeks to hold answerable for the acts of such wrongdoers: *McFarlane v. Milwaukee*, 51 Wis. 691; as where he seeks to hold a city liable for injuries caused from a defect in a street: *McFarlane v. Milwaukee*, 51 Wis. 691; or where proceedings must be taken against a debtor before the obligation of a surety to pay arises, for there is an implied condition in the contract that due diligence shall be used in proceeding against the principal: *Toles v. Ade*, 91 N. Y. 562; *Jackson v. Decker*, 14 N. Y. App. Div. 415; as where the collection of a mortgage is guaranteed: *Northern Ins. Co. v. Wright*, 76 N. Y. 445.

Where the facts are undisputed, the question of diligence, in such cases, in one of law: *Burt v. Horner*, 5 Barb. 501; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; 57 Hun, 265; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469. Otherwise, it is one of fact to be submitted to the jury: *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; 57 Hun, 265.

The guarantor cannot, it has been held, complain of laches where the holder of the guaranty commences suit within three months after the debt falls due: *Lamourieux v. Hewit*, 5 Wend. 307; and suffering one term to pass without suit after the debt falls due has been held not to be a want of diligence, where it appears that the guarantor sustained no injury by the delay: *Thomas v. Woods*, 4 Cow. 173. So, where the maker of a note moves away from the state insolvent, and has been poor, and in debt ever since the maturity of the note, it has been held sufficient that the holder employs an attorney recommended by the guarantor, but suffers three years to elapse without any suit brought: *Miles v. Linnell*, 97 Mass. 298. The indorsee of a note with a warranty of collection is not chargeable with unreasonable delay in holding the note in his hands for five or six days before putting it in suit; and he is not bound to attach the real estate of the maker, for he is not obliged to take real estate in satisfaction of the execution: *Foster v. Barney*, 3 Vt. 60. The assignee of an indorsed note, with a guaranty of collection, is not chargeable with negligence for failing to sue out an attachment, unless it appears that he knew, or, in the use of proper diligence, could have ascertained, facts which would authorize such extraordinary process: *Forest v. Stewart*, 14 Ohio St. 246.

The return of an execution unsatisfied is, of course, *prima facie* sufficient and satisfactory evidence that the debt is not collectible, and, in some jurisdictions, it is held that due diligence requires the prosecution of the debtor to execution and return of *nulla bona*, and that insolvency is no excuse for a failure to prosecute: *Jones v. Ashford*, 79 N. C. 172; *Newell v. Fowler*, 23 Barb. 628; *Bosman v. Akeley*, 39 Mich. 710; 33 Am. Rep. 447; *McNall v. Burrow*, 33 Kan. 495; *French v. Marsh*, 29 Wis. 649; *Eddy v. Stantons*, 21 Wend. 255; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; *Roberts v. Laughlin*, 4 N. Dak. 167; *Eddy v. Stantons*, 21 Wend. 255; but in other jurisdictions the principle is recognized that the law requires no idle act, and that it is more just not to require a suit, with all its attendant expense and trouble, where it must be fruitless, and to allow, under some circumstances, the diligence to be waived by the party for whose benefit it is required. Hence, it is held in some states that if the maker of a note, or other debtor, be so utterly insolvent that an action against him would be fruitless, the holder of the guaranty is not obliged to institute legal proceedings against the debtor before resorting to a suit on the guaranty. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has

always been regarded as one of the extreme tests of due diligence, which some courts have recognized and adopted: *Jones v. Ashford*, 79 N. C. 172; *Camden v. Doremus*, 3 How. 515. It is clear that insolvency does not excuse suit unless the fact is proved in some way, but the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit: *Cady v. Sheldon*, 38 Barb. 103; *Allen v. Rundle*, 50 Conn. 9; 47 Am. Rep. 599; *Camden v. Doremus*, 3 How. 515; *Sanford v. Allen*, 1 Cush. 473; *McDeal v. Yeomans*, 8 Watts, 361; *Brackett v. Rich*, 23 Minn. 485; 23 Am. Rep. 703; *Crane v. Wheeler*, 48 Minn. 207; *Lemmon v. Strong*, 55 Conn. 443; *Osborne v. Thompson*, 36 Minn. 528; *Stone v. Rockefeller*, 29 Ohio St. 625; *Lamourieux v. Hewit*, 5 Wend. 307. See subhead, *infra*, "What Will Discharge the Guarantor."

Law of Place.—In determining whether the holder of a guaranty for collection has used due diligence against the principal debtor before resorting to his guaranty, it sometimes becomes necessary to apply the law of place. If the maker of a note, which is guaranteed, removes from the state before it falls due, and leaves no property here, the holder of the guaranty may resort to his action thereon without pursuing the maker, or issuing an attachment, or commencing any action against him: *Cooke v. Nathan*, 16 Barb. 342; but if he did leave property here, the holder of the guaranty, before suing upon it, must first exhaust his legal remedy against the maker by suing out an attachment, or prosecuting his suit to judgment, and collecting what he can upon execution: *Mosier v. Waful*, 56 Barb. 80; *White v. Case*, 13 Wend. 543. If the maker of a note resided out of the state at the time of giving it, and continues to reside there, and has property at the place of his residence, it is the duty of the holder of a guaranty for collection to prosecute him there before he can have recourse to the guarantor: *Burt v. Horner*, 5 Barb. 501. Compare *Clayton v. Coburn*, 42 Conn. 348. So if a note is purchased with the knowledge that it is made by a nonresident, and that it is secured by lands in a distant state, there is no excuse for unreasonable delay in pursuing the principal debtor: *Jackson v. Decker*, 14 N. Y. App. Div. 415.

What Will Discharge the Guarantor.—A guarantor of the collection of a debt is discharged from all liability by the failure of the party guaranteed, or holder of the guaranty, to prosecute the principal, or debtor, with reasonable diligence after maturity of the debt and a failure to pay: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Burt v. Horner*, 5 Barb. 501; *Moakley v. Riggs*, 19 Johns. 69; 10 Am. Dec. 196; *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Toles v. Adees*, 91 N. Y. 562; *McFarlane v. Milwaukee*, 51 Wis. 691; *Jackson v. Decker*, 14 N. Y. App. Div. 415; *Roberts v. Laughlin*, 4 N. Dak. 167; *Shepard v. Phears*, 35 Tex. 763; *Tobin Canning Co. v. Fraser*, 81 Tex. 407; *Hart v. Hudson*, 6 Duer, 294; *Sawyer v. Haskell*, 18 How.

Pr. 282. As, where he delays for six months to take measures to collect the debt, where all the principals reside in the state and can be personally served: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; or where he delays for seventeen months to sue the maker of an indorsed note, after maturity, and the maker, in the mean time, has obtained his discharge under the insolvent act: *Moakley v. Riggs*, 19 Johns. 69; 10 Am. Dec. 196; *Burt v. Horner*, 5 Barb. 501; or where he, in the absence of any explanation, permits a frivolous answer to an ordinary action on a promissory note against a debtor in failing circumstances to remain on the record for three months, during which time not a step of any nature is taken in the action: *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423, 429; or where, after the time when the necessity for the commencement of an action has arisen, he waits for over four months before issuing process against, and serving it upon, a failing debtor in the same city, whose whereabouts are known and who is not concealing himself to avoid process: *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423, 429; or where he fails to bring suit on a promissory note, after maturity, until after two terms of court have passed: *Voorhies v. Atlee*, 29 Iowa, 49; or where he delays or neglects, without the consent of the guarantor, to prosecute the debtor for two years, and even a much shorter time, when the latter is within the jurisdiction: *Day v. Elmore*, 4 Wis. 190. So, if the purchaser of a note is bound, by a special guaranty, to sue and collect the note with due diligence, and he commences a suit thereon, the guarantor is discharged, if the plaintiff attaches property sufficient to satisfy the debt, but fails to collect the note on account of defective service of the writ: *Beach v. Bates*, 12 Vt. 68.

A guarantor is not answerable beyond the express terms of his undertaking: *Newlan v. Harrington*, 24 Ill. 206. Thus, under a guaranty to hold a person harmless against existing liabilities and uncollectible accounts of a corporation in proportion to the interest he may purchase in its stock, the purchaser cannot, by subsequently acquiring the whole of the corporate stock from various stockholders, recover the total loss suffered by the corporation by reason of such liabilities and uncollectible accounts, but, in his recovery upon the guaranty, is confined to the proportion which the shares purchased by him of the guarantor bear to the entire stock: *Glenn v. Hill*, 11 Wash. 541. The guarantor's liability is not, however, limited to the amount of consideration received by him for the guaranty, but is coextensive with the amount of the debt guaranteed: *Day v. Elmore*, 4 Wis. 190. A material alteration in the terms of a guaranty will avoid it and discharge the guarantor. Thus, by cutting off the words, "the collection of," upon a guaranty, the promise becomes an absolute one. This is a material alteration and avoids the guaranty: *Newlan v. Harrington*, 24 Ill. 206. So a guaranty in general terms, warranting the collection of a note, cannot be altered on the trial, so as to make it a guaranty to the plaintiff

in the suit, who is a subsequent holder of the note: *Lamourieux v. Hewit*, 5 Wend. 307. But, if one of several guarantors for collection is released on condition, and his name erased, but he signs the guaranty again, upon failure of the condition, there is no alteration, and a plea of non est factum by the others upon these facts is not sustained: *Tobin Canning Co. v. Fraser*, 81 Tex. 407. If, by the laches of the holder of a note, the guarantor thereof has been discharged, there is no moral obligation upon the guarantor to pay the note, and he cannot be again made answerable even upon an express promise: *Van Derveer v. Wright*, 6 Barb. 547. See subhead, *supra*, "Diligence."

Consideration.—A guaranty for collection must have a consideration to support it, but, if the guarantor signs at the time of giving a note, the consideration in the note becomes the consideration of the guaranty, and will support it: *Rich v. Hathaway*, 18 Ill. 548; *Dillman v. Nadelhoffer*, 160 Ill. 121; *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44. But while a consideration is required, it need not be expressed. It will be implied: *Burt v. Horner*, 5 Barb. 501; *Dillman v. Nadelhoffer*, 160 Ill. 121, 125. A guaranty for collection does not come within the statute of frauds, so as to be void because it does not express the consideration: *Crane v. Wheeler*, 48 Minn. 207, 211. *Contra*, *Hunt v. Brown*, 5 Hill, 145.

Notice.—In the case of a guaranty for collection there is no need of a demand or request. It is enough if the covenantor has notice of the failure to collect after all legal means have been exhausted: *Thomas v. Woods*, 4 Cow. 173. The only notice which the holder of a guaranteed note needs to give to the guarantor is notice of his inability to collect the note of the maker; and a failure to give even this notice is no defense to the guarantor, unless he has been prejudiced thereby: *Brackett v. Rich*, 23 Minn. 485; 23 Am. Rep. 703. A note payable on demand, with a warranty of collection indorsed thereon, is not, after a sale thereof, subject to the general rules of law which govern negotiable notes and bills of exchange, when transferred and indorsed in the usual way, and the indorsee need not demand payment of the maker, nor give notice to the indorser of the nonpayment, as in ordinary cases: *Foster v. Barney*, 3 Vt. 60. If the payee of a negotiable promissory note transfers it, before maturity, by indorsement, with a guaranty of collection, a failure to demand payment of the maker at maturity, and to give notice of nonpayment, does not discharge the guarantor from liability, because he is not entitled to notice until the default occurs upon which his liability depends, unless it is otherwise provided by the terms of the guaranty: *Forest v. Stewart*, 14 Ohio St. 246.

Assignment—Mortgage Security.—The transfer of a debt carries with it, as an incident, all the securities for its payment. A guaranty goes with the principal obligation, and is enforceable by the same persons who can enforce that: *Clafin v. Ostrom*, 54 N. Y. 581; *Ellsworth v. Harmon*, 101 Ill. 274, 277. The assignment of a note car-

ries with it a guaranty of collection, and vests in the assignee of the note a right to sue upon the guaranty in his own name: *Lemmon v. Strong*, 59 Conn. 448; 21 Am. St. Rep. 123. The assignment of a bond and mortgage carries with it a guaranty of the collection of the amount secured thereby, although the guaranty is not, in terms, assigned: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469.

If the holder of an obligation, secured by mortgage, sells it, guaranteeing its collection, and at the same time assigns the mortgage to the purchaser, the latter cannot maintain an action upon the guaranty until he has resorted to the mortgage, especially where it is conceded to be adequate security for the debt: *Dewey v. Clark Investment Co.*, 48 Minn. 130; 31 Am. St. Rep. 623; *Newell v. Fowler*, 23 Barb. 628; though in a case of the principal debtor's bankruptcy the holder of the guaranty may at once pursue his remedy thereon against the guarantor, without first exhausting the mortgaged premises: *Stone v. Rockefeller*, 29 Ohio St. 625. If the holder of a guaranty of collection of an obligation secured by mortgage uses whatever diligence is required of him by the terms of the guaranty in pursuing the securities, the guarantor cannot escape: *McNall v. Burrow*, 33 Kan. 495; *Jackson v. Decker*, 14 N. Y. App. Div. 415; *Day v. Elmore*, 4 Wis. 190; but in default of such diligence, the guarantor is released: *New York etc. Trust Co. v. Lombard Inv. Co.*, 73 Fed. Rep. 537; *McMurray v. Noyes*, 72 N. Y. 522; 28 Am. Rep. 180; *Roberts v. Laughlin*, 4 N. Dak. 167; *Northern Ins. Co. v. Wright*, 76 N. Y. 445.

Actions.—It was held in one or two early cases that an action on a guaranty for collection could be maintained only by him with whom the contract was made, and consequently not by a subsequent holder of the obligation; that it was a special contract, which could be enforced only in the name of the person with whom the contract was made: *Lamourieux v. Hewitt*, 5 Wend. 307; *McDoal v. Yeomans*, 8 Watts, 361; but the law now is that a guaranty goes with the principal obligation, and may be enforced by the same persons who could enforce that: *Clafin v. Ostrom*, 54 N. Y. 581; *Ellsworth v. Harmon*, 101 Ill. 274, 277; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Van Derveer v. Wright*, 6 Barb. 547.

To recover upon a guaranty of collection, the necessary facts fixing liability must be alleged: *Evans v. Bell*, 45 Tex. 553; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; 57 Hun, 265. It is incumbent on the plaintiff to show his inability, after reasonable diligence, to collect the obligation of the principal debtor; and, if there are several, this showing must be made as to each and all of them: *Aldrich v. Chubb*, 35 Mich. 350. If a note on demand is guaranteed as "good and collectible until paid," the guaranty holds good so long as the note is unpaid, and suit against the maker seven years after the execution of the guaranty and note is seasonably brought: *Lemmon v. Strong*, 55 Conn. 443. Nothing will excuse the duty devolving upon the holder of a guaranty of collection, except the act of the

guarantor himself: *Newell v. Fowler*, 23 Barb. 628; *Taylor v. Bullen*, 6 Cow. 624. The guarantor's consent to the holder's delay in suing the makers of a note is a waiver of his right to the immediate performance of a condition on which he had a right to insist. He can waive such right by parol, and, having done so, if a delay occurs, he is estopped from setting up such delay to prosecute as a defense to an action brought upon the contract of guaranty: *Day v. Elmore*, 4 Wis. 190. Whatever question a guarantor relies upon as a defense should be raised and distinctly presented: *Gallagher v. White*, 31 Barb. 92; *Cooke v. Nathan*, 16 Barb. 344. The makers of a note, the collection of which has been guaranteed by the payee to the holder, can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, although the assignee took the note before it was due and without knowledge of any infirmity in it: *Omaha Nat. Bank v. Walker*, 5 Fed. Rep. 399.

If a declaration upon a guaranty of collection avers the guarantor's liability to have been fixed by the prosecution of all the principal debtors to judgment and execution, without obtaining satisfaction, the plaintiff is bound to maintain this allegation by proofs of the facts alleged; but such proof establishes the right of a creditor to demand payment of a guarantor of collection: *Aldrich v. Chubb*, 35 Mich. 350; *Summers v. Barrett*, 65 Iowa, 292. Compare *Allen v. Rundle*, 50 Conn. 9; 47 Am. Rep. 599, showing that parol evidence is inadmissible to contradict a guaranty of collection. Evidence that the defendant guarantor was injured by the delay of notice that the note, the collection of which was guaranteed, could not be collected was held to be admissible in *Wolfe v. Brown*, 5 Ohio St. 304. If the holder of a note sues the guarantor of its collection before trying to collect it from the maker by law, it is essential to a recovery by him to prove that the maker was, at the maturity of the note, and still continues so utterly insolvent that an action against him would have been fruitless: *Osborne v. Thompson*, 36 Minn. 528. See, also, *French v. Marsh*, 29 Wis. 649.

PLACE v. ST. PAUL TITLE INSURANCE AND TRUST CO.

[67 MINNESOTA, 126.]

INSURANCE, TITLE.—THE TERM, "TENANCY OF THE PRESENT OCCUPANTS," used in a policy of title insurance as a defect in title not insured against, does not include the claim of one in actual adverse possession, asserting ownership in fee against the title insured, but must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are "tenants" in the popular sense of that term.

INSURANCE, TITLE—ACTION ON POLICY—CONDITION PRECEDENT—WHEN NOT APPLICABLE.—A condition, in a policy of title insurance, that no right of action shall accrue thereunder, "unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or encumbered by reason of a defect or encumbrance for which the company would be liable under this policy," is not available to the insurance company, in an action on the policy, where the land was not only in the actual adverse possession of another at the time the policy issued, but has been absolutely lost by reason of a defect in the insured title.

Action upon a policy of title insurance. The complaint alleged the issuance to plaintiffs, Place and another, of defendant's insurance policy to indemnify them as mortgagees of a certain tract of land, in block 15 of Robert & Randall's addition to St. Paul, by reason of defects in the title of the mortgagors of that tract. It alleged that, in 1894, the plaintiffs foreclosed their mortgage, and bid off the property for the amount due upon the mortgage, including taxes paid by the plaintiffs and the expenses of sale; that neither of the mortgagors had, at the date of the mortgage, any right, title, or interest in a certain strip on one side of the tract; that the plaintiffs had no notice of the defect until the year 1895; that the plaintiffs, in 1896, gave the defendant written notice of the defect in the title and of their claims for damages; that the plaintiffs had, on their part, complied with the requirements of the policy; and that the value of the strip of land so lost to them was twelve hundred dollars. A demurrer to the complaint was overruled and the defendant appealed.

Stevens, O'Brien, Cole & Albrecht, for the appellant.

Gilfillan, Willard & Willard, for the respondents.

128 COLLINS, J. Two questions only are presented by this appeal, both dependent upon the construction to be placed upon language used in a title insurance policy issued by defendant company to plaintiffs as mortgagees of certain real property. The contract, as stated in the policy, was, among other things, to in-

demnify, keep harmless, and insure plaintiffs from all loss or damage, not to exceed a stated sum of money, sustained by reason of defects in the title of the mortgagors in the mortgaged estate, excepting such as were set forth in an attached schedule, and subject, also, to the stipulations and conditions made a part of the policy. In the schedule an item, stated as "Tenancy of the present occupants," was mentioned as a defect in or objection to the title against which the company did not insure; and among the stipulations and conditions of the policy was one that: "No right of action shall accrue under this policy unless the insured, or those claiming under him as aforesaid, shall have been actually evicted under an adverse title not mentioned or referred to in the above Schedule B, or unless there has been a final judgment upon a lien or encumbrance not mentioned or referred to in said Schedule B, under which the title of the insured will be divested by sale under judgment or foreclosure, or unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or encumbered by reason of a defect or encumbrance for which the company would be liable under this policy."

From the complaint it appeared that, at a foreclosure sale of the mortgaged premises, the plaintiffs purchased the same for the full amount due on the debt; that no redemption had been made within the statutory period; that, at the date the mortgage was delivered, and when the policy was issued, the mortgagors were not the owners, ¹²⁰ in fee or otherwise, of a portion of the mortgaged premises, nor were they in possession, but, to the contrary, said portion was then, and ever since has been, owned and in the actual adverse possession and occupancy of other persons; and that, prior to the issuance of the policy, the mortgagors had been evicted therefrom.

1. It is the position of defendant's counsel that, from the allegations of this complaint, it appears that the case in hand was expressly excepted from the policy because of the words in the schedule, "Tenancy of the present occupants."

If we are to give these words their broadest signification, and construe them without regard to the object or purpose of the contract, or the language used elsewhere, the position would be quite easily sustained; for the broad definition of a "tenant" is one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. The persons mentioned in the complaint as having been,

and as still continuing, in adverse possession, are certainly tenants, within this comprehensive definition.

But, when we read the entire policy, and consider its object and alleged purpose—that it purported to be a contract to indemnify plaintiffs, as mortgagees, against loss or damage sustained by reason of defects in the mortgagors' title; that, if the construction contended for by counsel for the defendant should prevail, it would apply in cases where the entire premises were in the adverse possession of another, as well as those, like the present, where only a part is held adversely, leaving the policy holder remediless, when he has actually bought and paid for protection; that if the design of the defendant was to exclude from its policy all liability as to the title "of the present occupants," it could have said so by simply changing one word of the phrase, "tenancy of the present occupants," which, at most, is ambiguous only; that where an expression in an insurance policy is of such a character, the ambiguity is to be construed against the insurer, and in favor of the insured; that the word "tenant" is generally used in a popular sense, and, as mentioned in this sense, according to Webster, "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord"; and also that, without a provision of this import, the insurer would probably incur a liability if there were outstanding ¹³⁰ leases, and the insured could not obtain possession at any moment—we are decidedly of the opinion that the tenancy mentioned in the schedule was that which has arisen through the occupation or temporary possession of part or all of the premises by those who were tenants, in the popular sense in which that word is used: See *Caplis v. American etc. Ins. Co.*, 60 Minn. 376, 51 Am. St. Rep. 535.

2. As the complaint fails to allege the occurrence of any of the conditions precedent, hereinbefore quoted, as found in the policy, counsel for appellant urge this as another reason why the general demurrer should have been sustained.

A final judgment upon a lien or incumbrance certainly has no reference to a case like this. And counsel practically concede that the condition requiring actual eviction under adverse title has no application, for the defect upon which plaintiffs base their cause of action is inability to obtain possession, and entire want of title, and nothing else. It is really admitted by counsel that, if any of these conditions precedent stand in the way of a recovery upon the present complaint, it must be that which prohibits recovery, unless the insured has contracted to sell the estate or

interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or encumbered by reason of a defect or encumbrance for which the company would be liable under the policy.

If this condition was intended to apply to a case of this character, it demands of plaintiffs that, with full knowledge of a total want of title to a part of the premises, they find some one upon whom they can impose by entering into a contract to sell that which they do not own, or that they enter into a sham contract of sale, have the vendee refuse to perform, bring a suit against him, and then go through the form of an action which is fictitious from start to finish, and a fraud upon the court in which it is prosecuted. They are either compelled to perpetrate a fraud upon the innocent vendee, or a fraud upon the court in which they bring the action. We cannot believe that the defendant company ever intended the condition in question to cover a case like this, but, rather, that it was designed to guard against actions for nominal damages, instituted by persons who had ascertained that defects existed in their titles, but whose possession remained undisturbed, and who had suffered no loss. It was an adaptation of the law relating to covenants in a deed, that actual loss must ¹³¹ precede actual compensation, to the title insurance business. None of the conditions found in the quoted language apply to a case where not only does another party hold possession of the land adversely to the insured, but the latter has lost it absolutely by reason of a defect in the insured title.

Order affirmed.

INSURANCE — CONSTRUCTION OF TERMS — POPULAR SENSE.—The expression, "chattel mortgage," in a policy of insurance containing a condition that it shall be void if the building "be or become encumbered by a chattel mortgage," is used in its popular sense: *Caplis v. American Fire Ins. Co.*, 60 Minn. 376; 51 Am. St. Rep. 535.

PABST BREWING COMPANY v. BUTCHART.

[67 MINNESOTA, 191.]

CHATTEL MORTGAGE—WHEN VOID ON ITS FACE.—A chattel mortgage covering a stock of liquors and cigars is fraudulent and void on its face, as to creditors of the mortgagor, where it provides that he may sell and apply the proceeds toward keeping up the stock and paying expenses, and that any surplus is to be applied on the mortgage indebtedness.

Replevin. The plaintiff appealed from an order denying a motion for a new trial.

McGindley & Whitely, for the appellant.

Wilson & Wray, for the respondent.

191 CANTY, J. Under an execution issued on a judgment against one Wagner, the defendant, as sheriff of St. Louis county, levied on certain liquors the property of Wagner. Plaintiff brought replevin, claiming the property under a chattel mortgage made and delivered to it by Wagner, and filed of record prior to such levy. On the **192** trial, the court held plaintiff's chattel mortgage void on its face as to the creditors of Wagner, and dismissed the action. Plaintiff appeals from an order denying its motion for a new trial.

The only question raised on this appeal is, whether, as to the creditors of Wagner, the chattel mortgage is void on its face; and we are of the opinion that it is. It is the same chattel mortgage considered in the case of *Pierce v. Wagner*, 64 Minn. 265. But in that case the question here presented was not decided, as there was oral evidence tending to prove, as the court below decided, that the mortgage was, as to creditors, void in fact, and the decision was affirmed. The mortgage recites that it covers a stock of liquors and cigars, "being used and sold by the party of the first part at retail in the carrying on and conducting of a saloon." It further recites that the stock which it so covers is of the value of fifteen hundred dollars, and it provides that said stock shall, until the mortgage debt is paid, be kept up to that value by purchases from time to time by the mortgagor; that the proceeds of sales in the business shall be used to keep up the stock; that the mortgage shall also be a lien on the new stock so purchased; that the remainder of the proceeds of said sales shall be used in defraying all necessary expenses of carrying on and conducting said saloon; "and the balance of said proceeds, after the said purchase of new goods to supply the place of the goods sold in carrying on and conducting of said business, so as to keep said stock of the value

of fifteen hundred dollars as aforesaid, and the expense of carrying on and conducting of said business as aforesaid, shall be used alone for the payment of the indebtedness hereby secured."

The mortgagor covenants to pay over to the mortgagee "all said surplus proceeds of the sales of said stock, and to that end the said party of the first part is hereby created an agent of the said party of the second part to so sell said liquors, cigars, et cetera, at retail, as aforesaid; to purchase supplies for said saloon from time to time under the regulations and restrictions herein imposed; to pay off and discharge all the necessary expenses incident to and connected with the carrying on and conducting of said saloon; and to pay over and have credited upon said notes said surplus proceeds of said saloon business from time to time as aforesaid."

It is further provided that the mortgagor shall keep a correct account of his daily sales, "and account for his actions and doings ¹⁹⁸ once a month until the full payment of the indebtedness hereinbefore mentioned."

On the face of this mortgage, its chief purpose would seem to be to preserve the stock and goodwill of the business, shielded from the creditors of the mortgagor. At least, that is the primary purpose. It is a first mortgage for this purpose, and a second mortgage for the payment of appellant's claim. The whole stock may eventually be consumed in defraying the expenses of the business which it is stipulated shall be kept up and continued, and not a dollar may ever be left to apply on the mortgagee's claim.

It is a very common thing for a merchant to find himself running a losing business, especially in dull times, or times of financial stringency. If such a chattel mortgage should be upheld, it would permit every merchant who found himself in such a condition to hold his assets for the purpose of continuing and keeping up his business, and, as he would hope, tiding him over the dull times. He could accomplish this by giving such a chattel mortgage to one of his creditors, which would serve as a shield against all of his creditors. The mortgage, on its face, permits the mortgagor to dispose of the mortgaged property for his own use and benefit. The fact that it limits such use, and prescribes the particular benefit to himself to which he shall apply the proceeds of the property, does not make the mortgage any the less fraudulent as to creditors. For cases somewhat similar to this see *Gallagher v. Rosenfeld*, 47 Minn. 507, and *Greenebaum v. Wheeler*, 90 Ill. 296.

Order affirmed.

CHATTEL MORTGAGES—WHEN FRAUDULENT AS TO CREDITORS.—A chattel mortgage giving the mortgagor power to keep, use, and sell mortgaged property is fraudulent as to creditors: *First Nat. Bank v. Caperton*, 74 Miss. 857; 60 Am. St. Rep. 540, and note. Compare *Birmingham etc. Co. v. Roden*, 110 Ala. 511; 55 Am. St. Rep. 35, and note.

KNUTSON v. NORTHWESTERN LOAN AND BUILDING ASSOCIATION.

[67 MINNESOTA. 201.]

BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEPRECIATION OF ASSETS—WINDING UP—END OF CONTRACT.—If the affairs of an incorporated building and loan association show that there is a deficiency of assets, that the stock can never be matured, and that the purposes for which it was organized have wholly failed, a court of equity has jurisdiction to wind up the corporation, and such a proceeding puts an end to the contract between it and its members, at least so far as future performance is concerned.

BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEDICATION OF ASSETS—WINDING UP—ADJUSTMENT—RESCISSION.—In winding up the affairs of an incorporated building and loan association, where the purposes for which it was organized have wholly failed, and there is a depreciation of assets, the court should, in adjusting matters between it and its members, proceed upon the principle of rescission, so far as it can be equitably and justly applied, requiring each member, to this extent, to receive back what he has paid, and to pay back what he has received.

BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEPRECIATION OF ASSETS—WINDING UP—ADJUSTMENT—LOSSES AND EXPENSES—SETOFF.—If the purposes for which an incorporated building and loan association was organized have wholly failed, and a receiver is appointed to wind up the corporation whose assets have become depreciated, it is the duty of each member, whether a borrower or nonborrower, to bear his share of the losses and expenses of the corporation, and also the expenses of winding it up. Hence, a borrowing member is not entitled to set off all that he has paid against an advancement or loan which he has received, but only so much as remains after deducting what the court is fully satisfied will meet his share of the shortage. This deducted amount should be collected from the borrower, and held until final distribution, to be applied, so far as is necessary, toward paying such losses and expenses.

E. F. Crawford, for the appellants.

Frank R. Hubachek, for the respondent.

202 CANTY, J. The Northwestern Loan and Building Association, a corporation, was organized as a building and loan association. It ²⁰³ became insolvent, in the sense that its assets had depreciated, and it would not be able to mature its stock, and a

receiver was appointed to wind it up. One McLaughlin, a borrowing member, made a proposition of settlement. The receiver submitted such proposition to the court, and asked for instructions as to how he should settle with McLaughlin and all other borrowing members. The court, on proper notice, made an order instructing the receiver to accept McLaughlin's proposition, and settle with all the other borrowing members in the same manner. From this order a number of such other borrowing members appeal.

According to the plan of the association, the par value of the stock, when matured, would be \$100 per share. McLaughlin took 10 shares of stock, and on April 14, 1892, procured a loan or advancement of \$1000 on the same. He agreed, pursuant to the by-laws, to pay each month fifty cents premium and fifty cents interest on each \$100 of the loan, and also to pay sixty-five cents per month dues on each \$100 of his said stock, "until the dues so credited on the stock, together with the dividends declared thereon, shall equal the amount loaned." The performance of this agreement was secured by a bond and real estate mortgage given by McLaughlin. He made these payments from that time until the commencement of the proceedings to wind up the corporation, when he had paid: On stock, \$233.24; as interest, \$235; as premiums, \$235; total, \$703.24.

Pursuant to his said proposition, the court ordered that he be charged with the \$1,000, and interest thereon at the rate of seven per cent per annum from the date on which he borrowed the same, and that he be credited with the sums so paid as interest and premiums, "together with interest at 7 per cent per annum on said payments of interest and premiums from their respective dates in the manner of partial payments, . . . leaving the stock payments made by him, the said McLaughlin, of \$233.24 . . . in the hands of said receiver, to await the winding up of the said corporation, and to be paid back to him, the said McLaughlin, in the regular course of distribution by the receiver."

²⁰⁴ The by-laws, among other things, provide:

"Sec. 34. Each investing member shall pay into the treasury of the association not less than sixty-five cents per month on each \$100 of running stock owned by him . . . until such monthly payments, together with such other sums as he may choose to pay, and such dividends as may be declared thereon, shall together amount to the face value of said stock, at which time the member shall be entitled to receive the par value thereof in cash."

"Sec. 36. All loans shall bear interest at the rate of six per

cent per year during the continuance of the loan, payable at the rate of fifty cents per month on each \$100 of loan made.

"Sec. 37. All loans shall bear premium at a rate fixed annually by the board of directors.

"Sec. 38. Each borrowing member shall pay to the association not less than one dollar and sixty-five cents per month on each \$100 of loan made to him, which sum shall be applied as follows: 1. To the payment of any fines or other assessments made against him in pursuance of the by-laws; 2. To the payment of the premium due on such loan; 3. To the payment of the interest due on such loan; 4. The balance of such payment shall be credited as dues on the stock on which such loan is taken. Such payments shall be continued until the dues so credited on the stock, together with the dividends declared thereon, shall equal the amount loaned. The loan and the stock on which it was taken shall then both be canceled, and the borrower's mortgage released."

"Sec. 43. The board of directors, on the first day of January and July of each year, shall declare such dividends as may accrue from the earnings of the association, after deducting therefrom all expenses and losses, and also such sum as they may reserve for the fund used for the payment of contingent losses."

Section 48 provides that investing members may withdraw at any time, and shall receive back certain specified portions of the amounts paid in, not exceeding the net profits of the association. It further provides: "A borrower may pay off his loan on application, at any time, by paying the balance due after deducting the value of the shares assigned to the association as collateral; or the shares may be redeemed and retained by paying the amount of the loan in full."

It also appears from the report of the receiver that less than one-third in cost of the assets of the association is invested in present mortgage loans (made to its members); that the rest of such assets consist mainly of real estate which cost the association very much ²⁰⁵ more than its present value; and that all that can be realized from all of the assets will repay the present members much less than they have contributed to the association.

The so-called "insolvency" of the association, and the proceedings to wind it up, put an end to the contract between it and its members, at least so far as future performance is concerned: *Strohen v. Franklin Sav. etc. Assn.*, 115 Pa. St. 273; *Brownlie v. Russell*, L. R. 8 App. Cas 235; *Towle v. American etc. Assn.*, 61 Fed. Rep. 446.

Again, the original scheme has totally failed, and can be carried out in scarcely any particular. The members can no longer withdraw in the manner provided by the by-laws: *Brownlie v. Russell*, L. R. 8 App. Cas. 235. The stock can never be matured, and the members have no right to be repaid in the order in which the stock of each would have matured if the scheme was successful, and had been carried through. Then, in winding up such a corporation, we can see no principle on which to proceed in adjusting matters between it and its members, except the principle of rescission, so far as the same can be equitably and justly applied. Each member should, to this extent, receive back what he paid and pay back what he received.

It may be urged that the theory of rescission here adopted will, in many cases, offer a great inducement to the borrowing member to attempt to have the association wound up by the court. For instance, where the borrowing member has paid, or agreed to pay, a large amount of premium for the loan or advancement to him, he will receive back the premiums paid and escape payment of the unpaid premiums if he can wind up the association and settle with it on the theory of the rescission of his contract. But it must be remembered that, before the association can be thus wound up, there must be such a deficiency of assets that it appears that the scheme has failed, and the purposes for which the association was organized cannot be carried out. Where there are no outside creditors, such deficiency of assets does not constitute insolvency, in any proper sense of the word, but is merely a loss of corporate capital, and a consequent depreciation in value of the stock held by the members. Then the remedies for winding up a corporation on the ground of insolvency do not apply.

²⁰⁶ However, a court of equity has jurisdiction to wind up a corporation when the purposes for which it was organized have wholly failed: 1 *Morawetz on Private Corporations*, 2d ed., secs. 285, 286; *Towle v. American etc. Assn.*, 61 Fed. Rep. 446. When there is such a deficiency of assets that the scheme has failed and the stock cannot be matured, it can hardly be said that there is any adequate or substantial consideration for the premiums so agreed to be paid for the loan; for the expected consideration has largely or almost wholly failed. The benefits to be derived from membership have failed. The benefits expected to be derived by the borrowing members from the premiums to be paid by themselves, and divided between themselves and the nonborrowing members, have also largely failed. Then we are of the opinion that, in adjusting matters between this corporation and its mem-

bers, the principle of rescission should be applied as far as it is just and equitable. There may, however, be items to which this principle could not be applied; such, for instance, as fines and penalties imposed to compel observance of the by-laws and a prompt and orderly transaction of business. As to this we express no opinion.

But, while each member should receive back what he paid and pay back what he received, it is the duty of each member, whether borrower or nonborrower, to bear his share of the losses and expenses of the corporation, and also the expenses of winding it up. These members are not strangers to the corporation, and have not dealt with it as such, but each is a member of the corporate entity. Then, as far as such losses and expenses are concerned, there can be no rescission.

It follows, therefore, that the borrowing member is not entitled to set off all that he has paid against the advancement or loan which he has received. If the borrowing members are permitted to do this, it will throw the whole burden of such losses and expenses upon the nonborrowing members. Then the borrowing member should only be allowed to set off a part of what he has paid against the loan or advancement which he has received and the balance of such loan or advancement should be collected from him, thereby leaving the other part of what he has so paid to be held until final distribution, and applied, as far as necessary, on such losses and expenses. The part which should be thus held to cover such losses ²⁰⁷ and expenses should be such an amount as the court is fully satisfied will cover the same.

From the state of affairs reported by the receiver in this case, it appears highly probable that there will be a considerable shortage of assets when all of the same are converted into cash, and we cannot say that the court below erred by ordering too large a part of the amounts paid in by McLaughlin and the other borrowing members to be so held to meet their share of the shortage; that is, their shares of such losses and expenses. McLaughlin had another lot of stock on which he had received another loan or advancement, and the court below made a like order as to it.

This disposes of all the questions raised, and the order appealed from is affirmed.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS AND LIABILITIES OF MEMBERS—LOSSES AND EXPENSES.—The insolvency of a company puts an end to its operations as a building association; to a certain extent it also ends the contract between it and its members respectively, and nothing re-

mains but to wind up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or nonborrowers more than their respective shares. That result may be reached by requiring the borrower to repay what he actually received, with interest: See monographic note to *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 27, as to the effect of the insolvency of building and loan associations on the rights and liabilities of their members. A court of equity has power to wind up the affairs of such an association, and each member thereof is under an obligation to contribute his share of its losses and expenses: See monographic note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 154, 165, on building and loan associations. Where the premature winding up or dissolution of the corporation is the result of its insolvency and the appointment of a receiver, or from such other circumstances as make it clear that the corporation can no longer continue in business and that the expectations of its members can never be realized, the courts, so far as possible, treat this changed condition of affairs as equivalent to a rescission and as terminating the contract between it and its members: Note to *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 25. In a settlement of the affairs of an insolvent building and loan society, each borrowing member indebted to it must be charged with the amount received by him, with legal interest from the time of the loan, and must be credited with all payments made by him, whether as fines, penalties, dues, or otherwise; and each nonborrowing member must be credited with the sums paid in by him, with legal interest from the date of payment: *Strauss v. Carolina etc. Loan Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585.

FIRST NATIONAL BANK v. FORSYTH.

[67 MINNESOTA, 257.]

NEGOTIABLE INSTRUMENTS—WHEN DISHONORED.—

If a note is indorsed before maturity, it is dishonored paper at the time of the indorsement, if interest is then overdue on it and unpaid, and this fact is known to the purchaser. The note, in his hands, is, therefore, subject to all equities between the original parties, for he is not a bona fide purchaser without notice.

Action by the bank, against Forsyth and another, on a promissory note. The plaintiff appealed from an order denying a motion for a new trial.

Ashley Coffman, for the appellant.

J. W. Seager and W. S. Hammond, for the respondents.

257 MITCHELL, J. The only question presented by this record is, whether the promissory note in suit was dishonored paper at the time it was indorsed to the plaintiff, and therefore subject, in its hands, to defenses existing between the original parties. The note was executed April 4, 1891, and was payable July 1, 1894, with interest payable annually. The court finds that it

was indorsed to the plaintiff on May 22, 1894; that on that day the plaintiff paid for it two hundred and forty-three dollars; that at that time there was interest overdue and unpaid on the note, and that that fact was known to the plaintiff at the time of the purchase. The evidence amply sustains these findings. No interest had ever been paid, and hence there were, at the time of the purchase, two yearly installments of interest overdue and unpaid. The sum which was paid for the paper fully justified the court in finding that the plaintiff knew of this default. Therefore, ²⁵⁸ the case is not distinguishable from *First Nat. Bank v. Scott Co.*, 14 Minn. 59 (77); 100 Am. Dec. 194. We are asked, however, to overrule that case, for the reason that it stands alone and is contrary to the uniform current of authorities in other jurisdictions. If this was true, it would probably be sufficient reason for overruling the case, because uniformity is eminently desirable in rules governing negotiable paper.

All the authorities agree that, when the principal of a note is payable by installments, and one installment is overdue and unpaid at the time the paper is indorsed and transferred, the whole paper is dishonored, and subject to all equities between the original parties. Whether or not the same rule applies when there is an installment of interest overdue is a controverted question—at least, the authorities are not all agreed on it.

The cases holding, either directly or impliedly, that the indorsee for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, are the following: *National Bank v. Kirby*, 108 Mass. 497; *Cromwell v. County of Sac*, 96 U. S. 51; *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; *State v. Cobb*, 64 Ala. 127; *Brooks v. Mitchell*, 9 Mees. & W. 15. The first three are the only cases in which the question is discussed, and of these the last two adopt substantially the line of reasoning used in *National Bank v. Kirby*, 108 Mass. 497. Among the text-writers Daniel, Bigelow, and Tiedeman favor this rule. The supreme court of Wisconsin had held the same way in *Boss v. Hewitt*, 15 Wis. 260, but held differently, or at least expressed different views, in *Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728, but finally overruled this dictum in *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697.

The authorities on the other side of the question are *Newell v. Gregg*, 51 Barb. 263, *First Nat. Bank v. Scott Co.*, 14 Minn. 59 (77), 100 Am. Dec. 194, and *Chouteau v. Allen*, 70 Mo. 290-339. While *Newell v. Gregg*, 51 Barb. 263, is not the decision

of a court of last resort, we do not find that it has ever been overruled in the state of New York, or that the court of appeals of that state has ever passed upon the question. These are all the cases we have been able to find on either side. The line of reasoning in *Newell v. Gregg*, 51 Barb. 263, is that, as to notice of dishonor, there is no difference between an overdue and unpaid installment of principal and an overdue and unpaid installment of interest; that payment of one is as much a part of the agreement as payment of the other; and ²⁵⁰ that, in either case alike, the indorsee takes the note with warning that there has been a default, and that the maker may have a defense; and hence, if the one renders the paper dishonored, there is no reason for holding that the other does not. The reasoning in *National Bank v. Kirby*, 108 Mass. 497, is that, in their effect upon the credit of a note, there is a manifest difference between a failure to pay interest and a failure to pay principal; that interest is an incident of the debt, and differs from it in that it is not subject to protest and notice to indorsers or to days of grace; that the statute of limitations does not run against it until the principal is due, et cetera.

If the question were a new one in this state, we might, possibly, be inclined to adopt the Massachusetts doctrine, as founded on the better reasoning. But *First Nat. Bank v. Scott Co.*, 14 Minn. 59 (77), 100 Am. Dec. 194, has stood unchallenged in this state for twenty-seven years, and the decisions are not so numerous or so uniformly in favor of the opposite doctrine as to clearly prove that it is the established rule of the commercial world generally. If the rule ought to be changed, it is a very easy matter for the legislature to do it. The practical difference between the two doctrines is not as great as might at first seem, for, even under the Massachusetts rule, the nonpayment of interest is a fact proper to be considered, in connection with other circumstances, upon the question whether the holder is entitled to the position of one who has purchased the paper in good faith and without notice of existing defenses. And we do not think any court has ever gone so far as to hold that the defaults in payment of interest may not be so numerous and of such long standing as to be sufficient, of themselves, to justify a court or jury in finding that the holder was not a purchaser without notice. For these reasons we think that *First Nat. Bank v. Scott Co.*, 14 Minn. 59 (77), 100 Am. Dec. 194, should be followed, upon the ground, if no other, of *stare decisis*.

Order affirmed.

NEGOTIABLE INSTRUMENTS—INTEREST DUE—DISHONORED PAPER.—A promissory note, indorsed before maturity, is dishonored where interest is due and unpaid at the time of the indorsement, and the indorsee takes it subject to all equities between the original parties: *Hart v. Stickney*, 41 Wis. 630; 22 Am. Rep. 728. *Contra*, *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; but compare note to this case. Bonds having attached coupons, for several years overdue and unpaid, are dishonored on their face, and a purchaser thereof takes them subject to all equities: *First Nat. Bank v. County Commrs.*, 14 Minn. 77; 100 Am. Dec. 194, and monographic note thereto, discussing the question as to whether a negotiable instrument, on which interest is past due, is to be regarded as dishonored, and subject to defenses in the hands of a bona fide holder, and taking the position that it is not.

WISCONSIN RED PRESSED BRICK COMPANY v. HOOD.

[67 MINNESOTA, 329.]

SALES—IMPLIED WARRANTY—PARTICULAR PURPOSE.—If a person agrees to sell bricks of a certain grade, equal to sample sent, but no sample is agreed upon or sent, and the bricks are accepted without reference to sample, the contract must be construed as calling for bricks of a well-known kind or description. Hence, there is no implied warranty that the bricks are fit for a particular purpose, and the purchaser, having accepted and retained them, is answerable for the reasonable value thereof.

MECHANIC'S LIEN—SUBCONTRACTOR—DEFENSE BY OWNER.—A subcontractor may acquire a mechanic's lien, although his contract, and the performance of it, do not, in all respects, conform to the agreement between the contractor and the owner. Hence, if bricks furnished by a subcontractor, and used in a building, are only "the grade known as common brick," while the agreement between the contractor and owner calls for "kiln-run" brick, which is a grade superior to common brick, yet, if the bricks furnished are reasonably adapted for such use, the owner has no defense against the subcontractor's lien except such as could have been interposed by the contractor himself.

SALES—LATENT DEFECT—CONTRACTOR'S LIABILITY. If there is a latent defect in bricks sold, caused by unfit clay, and not discoverable by the exercise of care and skill in inspecting the brick after they are manufactured, and a contractor, in good faith and without knowledge of the defect, buys the bricks and uses them in constructing a building, which is accepted by the owner, the contractor is without fault, though the defect in the bricks is subsequently developed by their exposure to the weather. The contractor is not, therefore, answerable to the owner for the latent defect, and the owner cannot recoup against him the amount of damage to the building caused by such defect.

Action against Hood and the Hurd Refrigerator Company. There was a judgment for the plaintiff, the Wisconsin Red Pressed Brick Company, and the defendant refrigerator company appealed from an order denying a motion for a new trial.

White & McKeon, for the appellant.

Shaw, Cray, Lancaster & Parker, for the plaintiff respondent.

William B. Phelps, for the respondent Hood.

³³⁰ CANTY, J. This is the third appeal in this action. See Wisconsin etc. Brick Co. v. Hood, 54 Minn. 543; 60 Minn. 401; 51 Am. St. Rep. 539. After the second appeal, the case was again tried before the court, without a jury. The court found that about 80,000 of the brick sold by plaintiff to the contractor Hood "contained a latent or hidden defect, known to plaintiff, which caused them to disintegrate and crumble upon their exposed surfaces, and such defect was not visible or known to the defendants when using said bricks in said buildings, nor when they accepted the same, nor could such defect have been discovered by the use of ordinary means, but could only be determined and developed by exposure in the walls. That, to the extent of 80,000 bricks, said lot of bricks so sold and delivered were not common bricks of good quality, and that the value of said entire lot was and is the sum of \$3.50 per thousand, and not \$5.50, which difference in value was caused by the hidden or latent defect aforesaid."

On this finding, the court ordered judgment in favor of plaintiff, and against Hood, for the balance due at such rate of \$3.50 per thousand, to wit, \$258.50, and declared the same a lien on the land of the Hurd Refrigerator Company, and the buildings erected thereon. On certain stipulations made on the trial, the court found that there is due Hood the further sum of \$3,416.17, with interest thereon since October 5, 1891, for which a lien was declared on said premises. From the judgment entered thereon, and also from an order refusing to set aside the judgment, the refrigerator company appealed.

1. The bill of exceptions states that it contains all the evidence offered and received having any bearing on the value of the brick. ³³¹ Appellant contends that the evidence will not sustain a finding that, at the time of delivery, the value of the brick was as much as \$3.50 per thousand. We cannot so hold. One of plaintiff's witnesses testified that the brick so delivered was of the value of \$6 per thousand.

2. The bill of exceptions further states: "Charles Hurd, a witness sworn on the part of the defense, testified that the difference in value of the factory building from what it would have been if built of common brick of good quality, or of the best

quality of red, kiln-run, well-burned Menominee brick, was \$2,500 less than it would have been if so built, and, in like manner, the difference in value of the engine-house was \$3,000 less than it would have been if built of such brick; and there was no testimony in contradiction of this."

Appellant contends that, on this state of the evidence, plaintiff is not entitled to recover anything, because the damage to appellant's building by reason of the defective character of the brick is greater than either the value or contract price of the brick. This question was disposed of on the first appeal in this case, where the court held that there was no evidence "which would justify the claim of counsel that there was an implied warranty that the bricks to be furnished by plaintiff should be suitable for the use intended by Hood."

Plaintiff agreed to sell and deliver Hood bricks "to be of the grade known as common bricks, . . . to be of good quality and equal to the sample sent." On the last trial the court found: "That no sample or samples of the grade known as 'common' were ever, in fact, agreed upon or delivered to Hood, as mentioned in said contract, and the brick actually delivered were accepted by defendants without any reference to any sample or samples."

On said first appeal, we held that this contract called for an article of a well-known kind or description; and that there was no implied warranty that it was fit for the purpose for which the purchaser intended to use it. That decision is now the law of this case. Hood, having accepted and retained the brick, is liable for the reasonable value of the same.

3. But appellant claims that, even if plaintiff is entitled to judgment against Hood, it is not entitled to a lien on defendant's property. ³³² We cannot so hold. In order that the subcontractor may maintain a mechanic's lien, it is not necessary that his contract and his performance of the same conform in all respects to the contracts between the contractor and owner. While better brick were needed for the outside course of the walls, the bricks furnished were reasonably adapted for the rest of the walls. Under the circumstances, appellant has no defense except such as could have been interposed by Hood himself.

4. It was stipulated on the trial: "It is admitted between the defendants that the amount due the defendant Hood from the Hurd Refrigerator Company, if there had been a fulfillment of the contract between the defendants, so that there would be no

deduction on account of the bad quality of the brick and the damage arising therefrom, would be \$3,695.67, with interest from the 5th day of October, 1891; and, had the brick furnished by the plaintiff to the defendant Hood been according to the contract between the plaintiff and the defendant Hood, this would be the amount due, and a lien on the property described in the complaint."

It was further stipulated between the defendants that a full performance by plaintiff of the contract with Hood would have made a full performance of Hood's contract with the refrigerator company, and that "whatever default in the last-mentioned contract said Hood was guilty of was due to, and caused by, the default of the plaintiff in the performance of the first-mentioned contract in furnishing brick."

As we construe these stipulations, they mean that, if both contracts were fully performed, there would be due Hood \$3,695.67, after deducting the full amount due plaintiff, at the rate of \$5.50 per thousand for all the brick furnished by it, as, under the statute (Gen. Stats. 1894, sec. 6238), the contractor is entitled to a lien only for the balance due him, after deducting the amount due the subcontractor. The court allowed Hood \$3,416.17, which was less than was stipulated as due him. But acting on the theory that the amount which would be due plaintiff, if it had fully performed, was not deducted when stipulating the amount due Hood, his attorney entered judgment in his favor for only \$3,045.67, and interest thereon since June 29, 1891. If the theory thus acted on is correct, there has not been enough deducted from what was awarded Hood, because, if plaintiff had properly ³³³ performed, it was entitled to recover a balance of \$920.50, instead of only \$258.50, and, in equity at least, its faulty performance should not inure to Hood's benefit, and increase the amount awarded him, but, on the contrary, the whole \$950.50 should, in any event, have been deducted from the balance which would be due Hood according to his contract with the refrigerator company.

However, appellant makes no point as to this, but contends that, on the uncontradicted evidence as to the damage to the buildings caused by the latent defect in the brick, Hood is not entitled to recover anything. Hood's contract with appellant required him to furnish "kiln-run" brick, while his contract with plaintiff required it to furnish only "the grade known as common brick," which, as the evidence shows, is a grade inferior to kiln-run brick. Appellant might, at least, have been entitled to re-

coup against Hood, as damages, the difference between what the buildings would be worth if built of kiln-run brick, and what they would be worth if built of the grade known as "common brick." But there was no evidence introduced to prove the amount of this difference, and besides, by the stipulation above referred to, the defendants contradicted and nullified the effect of the evidence showing that there was such a difference, and that Hood had deliberately proceeded to violate his contract with the refrigerator company by contracting with plaintiff for common brick instead of kiln-run brick.

But appellant contends that Hood is responsible to it for the latent defect in the brick, and that it is entitled to recoup against him the amount of damage to the buildings caused by such defect. We cannot agree with appellant. Undoubtedly, if Hood had manufactured the brick himself, he would then, so to speak, be manufacturer of both the brick and the buildings, and would be liable for the damage to the buildings caused by such latent defect in the brick. But Hood did not manufacture the brick, had no knowledge of the defect in them, acted in good faith, and exercised reasonable care and skill. No amount of care and skill would have discovered the defect, and his contract was completed, and the building accepted by the refrigerator company, before the defect was discovered. Even though an article is furnished for a particular use, if the vendor is not the grower or manufacturer, there is, as a general rule, no implied warranty against latent defects. The vendor of provisions for ³³⁴ immediate consumption is generally held to be an exception to this rule, and it has sometimes been made a question whether the vendor of seed is not also such an exception. *Caveat emptor* is the general rule.

In *Bluett v. Osborne*, 1 Stark. 384, Lord Ellenborough held the plaintiff entitled to recover for a bowsprit furnished by him for a vessel, although the bowsprit turned out to be defective. It was apparently good when furnished. It does not appear that plaintiff was the manufacturer. In *Gray v. Cox*, 4 Barn. & C. 108, the plaintiff furnished copper sheathing for a vessel. The copper contained a latent defect, and, while the case went off on another point, stress was laid on the fact that plaintiffs were not the manufacturers of the copper. *Jones v. Bright*, 5 Bing. 533, is a case quite similar in all respects, except that the seller of the copper was himself the manufacturer, and the court held him liable on an implied warranty against the latent defect. Some of the judges used language which would imply that any

seller, whether manufacturer or not, is liable on such an implied warranty, but no cases were cited to sustain such dicta. In *Brown v. Edgington*, 2 Man. & G. 279, the seller represented himself to be the manufacturer when he contracted to furnish the article. In *Shepherd v. Pybus*, 3 Man. & G. 868, 881, it is said: "The subject of the purchase was a barge built by the seller himself; and the purchaser had had no opportunity of inspecting it in its progress, and the defects which were afterward discovered were not apparent upon inspection, and could only be detected upon trial."

For these reasons, it was held that there was an implied warranty that the barge was fit for ordinary use. In *Jones v. Just*, L. R. 3 Q. B. 197, the court laid down five propositions, covering different types of cases, and, in the fourth, the dealer, as well as the manufacturer, is said to be liable on such an implied warranty in a sale made by him; but the cases cited in support of this are the ones last above cited, which do not sustain the proposition that the mere dealer is liable on such an implied warranty. The case then before the court did not call for any decision on this point, as it was merely a case of a sale of goods to arrive in port, and, when they arrived, they were found not to be merchantable. In *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, the cases were reviewed at length by Seldon, J.; and it is ³³⁵ held that, even where a manufacturer furnishes an article for a specific purpose, an implied warranty against latent defects can only be held to exist on the ground that it is presumed that he or his servants, for whom he is responsible, knew of the defect. In *White v. Miller*, 71 N. Y. 118, 131, 27 Am. Rep. 13, it is said: "It was decided in *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor, and there seems to be the same reason for implying a warranty on a sale of seeds by the grower."

In *Randall v. Newson*, L. R. 2 Q. B. Div. 102, the court held the manufacturer to be an absolute insurer against all latent defects, and liable for all damages caused by such defects; and this seems to be the holding of the court in *Rodgers v. Niles*, 11 Ohio St. 48; 78 Am. Dec. 290.

We are of the opinion that such an extraordinary responsibility is not, by the principles of the law, imposed on the manufacturer. The correct rule was applied in *Bragg v. Morrill*, 49

Vt. 45, 24 Am. Rep. 102, and Archdale v. Moore, 19 Ill. 565 (approved in Kohl v. Lindley, 39 Ill. 195, 89 Am. Dec. 294), where it is held that the manufacturer is only liable for failing to exercise the proper degree of care and skill in the selection of material, and in the manufacture of the same, and that he impliedly warrants that he has done this.

This disposes of the case, and the order and judgment appealed from are affirmed.

SALES—LATENT DEFECT—MANUFACTURER'S LIABILITY. A manufacturer is not an absolute insurer against all latent defects, and liable for all damages caused by such defects, but he does impliedly warrant that he has exercised the proper degree of care and skill in the selection of material, and in the manufacture of the same. He is liable for a failure to do this, but no further: Note to Wisconsin etc. Brick Co. v. Hood, 51 Am. St. Rep. 543.

SALES—IMPLIED WARRANTY—PARTICULAR PURPOSE.—If a known, described, and defined article is ordered of a manufacturer, and the exact thing bargained for is supplied, there is no implied warranty of its fitness for a particular use intended by the purchaser: Note to McCaa v. Elam Drug Co., 62 Am. St. Rep. 94; Wisconsin Red Pressed Brick Co. v. Hood, 60 Minn. 401; 51 Am. St. Rep. 539.

SALES—LATENT DEFECTS.—A MANUFACTURER is not liable for any latent defect in material used by him which he is not shown, and cannot be presumed to have known: Note to Wisconsin Red Pressed Brick Co. v. Hood, 51 Am. St. Rep. 543.

MECHANIC'S LIEN—SUBCONTRACTOR.—Although the contractor fails to perform his agreement, subcontractors may be entitled to a mechanic's lien for what work done and materials furnished are reasonably worth, after deducting any claim for damages for such nonperformance by the contractor: Jarvis v. State Bank, 22 Colo. 399; 55 Am. St. Rep. 129, and note. See, also, Creswell Iron Works v. O'Brien, 156 Pa. St. 172; 36 Am. St. Rep. 30; and note to Benedict v. Hood, 19 Am. St. Rep. 699.

SCHUSSLER v. BOARD OF COMMISSIONERS OF HENNEPIN COUNTY.

[67 MINNESOTA, 412.]

COUNTIES—UNLAWFUL ACTS OF OFFICERS—LIABILITY.—If a county, through its board of commissioners, does an unlawful act, such as erecting and maintaining a dam without authority of law, or adopts and ratifies the act after it has been done, and insists upon retaining the benefit of the illegal act of its officers, it is answerable in damages.

Action brought by Schussler against the board of commissioners to recover damages alleged to have been caused by reason of a dam constructed and maintained by the county, and

for an injunction. There was a judgment for the plaintiff, and the board appealed.

A. H. Nunn, special attorney for Hennepin county, for the appellant.

Young & Fish, for the respondent.

414 BUCK, J. The board of county commissioners of Hennepin county in the year 1893 erected a dam across Minnehaha creek, the natural outlet of Lake Minnetonka, and about three and one-half miles below said lake, under the supposed authority of Special Laws of 1891, chapter 381, for the purpose of raising and maintaining a uniform height of water in the lake, in aid of navigation. The plaintiff at the time of the erection of the dam, and many years prior thereto, owned a piece of land about three and one-half miles below this dam, upon which he had erected and used a gristmill operated by the water of this stream; and, to this end, plaintiff had provided the necessary wheels, pond flumes, and raceway power, and, until interfered with by the defendant's erection of the dam, he was enabled to store and use the waters of this stream, by means of said pond and other facilities possessed by him, and whereby said mill was propelled and operated for his use and profit. The defendant erected said dam about five feet in height, and, ever since its erection, has maintained the same, whereby said stream has been obstructed and held back except at times when the stage of **415** water in Lake Minnetonka is sufficiently high to flow over said dam. The dam so erected and maintained is five inches above the natural bed of the stream, and the sole purpose of defendant in erecting the dam and obstructing the natural flow of the stream was to hold back and retain the water in Lake Minnetonka for the purpose of increasing the volume of water therein, and maintaining a uniform quantity and stage of water in aid of navigation, the lake being an inland, navigable one.

The action is one to recover damages alleged to have been sustained by plaintiff by reason of the construction and maintenance of said dam, and for an injunction restraining and enjoining the defendant from maintaining the same so as to interrupt the natural flow of the water in the stream mentioned. The trial court, among its other findings of fact, also found: "That the plaintiff, by reason of the construction and maintenance of the dam as above stated by the defendant, and the consequent obstruction of, and interference with, the natural and customary

flow of the waters of said Minnehaha creek, has been deprived of the natural use of said waters, and is thereby subject to hindrance and great inconvenience in and about the operation of his said mill to his damage in the sum of five hundred dollars." And as conclusions of law: "1. That the plaintiff is entitled to judgment herein for the abatement of said dam so erected and maintained by the defendant board, so far as said dam obstructs the natural flow of said stream; 2. For a perpetual injunction ordering and requiring defendant to lower said dam five inches from the top thereof, and for such a width as was the natural width of the original bed of said stream; 3. For the recovery of five hundred dollars as damages, and for the costs and disbursements in this action."

While the plaintiff had no property interest in the water itself, he had an interest in it as it passed along through his land as it was wont to run, and a wrongful and unlawful interference so as to materially interrupt or diminish the natural flow of the stream to plaintiff's damage would constitute a cause of action. The county attorney, representing the defendant, conceded that the acts of the board were unlawful, and that Special Laws 1891, chapter 381, relating to the improvement of the navigation of Lake Minnetonka, and establishing and maintaining a uniform height of water in said lake, under which they assumed to act, was unconstitutional, and insisted that ⁴¹⁶ such acts were ultra vires, and hence no action against the county could be maintained. Upon this concession of appellant's attorney, and certain allegations in the answer, the question to be determined is the liability of the defendant.

The stream, dam, and property in question are all situated in the county of Hennepin, and whatever was done by the county commissioners was done in pursuance of apparent legislative authority, and under a legislative act in terms conferring the power to act in the manner admitted and proven. Some of these acts were done pursuant to legislative enactments prior to the passage of Special Laws 1891, chapter 381, but the dam in question was erected subsequent to the passage of that act, and by virtue of its apparent authority; and it is this act which appellant's counsel concedes to have been unconstitutional, and hence he asserts that, the acts of the board of county commissioners being tortious and unauthorized, the defendant is not liable in damages for whatever the members of the board may have done in the premises—in other words, that Hennepin county had no right to build the dam in question, and therefore the county is not

liable for the resultant damages. But this contention is inconsistent with defendant's defense as alleged in its answer. There it expressly affirms the doings of its official board, alleges that its acts were lawful, and that it did no more than it had a legal right to do, in the erection and maintenance of said dam. It not only fails to plead that the acts complained of were ultra vires, but it adopts, assumes, and ratifies the acts complained of, and, by its pleadings, insists that such acts were right, proper, and legal, and also insists that such acts were performed under a public necessity.

This is therefore not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by defendant, and that it was performed within the scope of the board's official duty. It comes into court, and, by its pleadings and evidence, attempts to uphold the wrongs it has done by its officials, and persists in the continuance of this wrong, but, by contention of counsel, insists that it is not liable in damages, because its acts were unconstitutional, unauthorized, and void. Not only this, but it insists upon retaining the benefits of the illegal acts of its officers. It is not willing that the wrong shall cease, but aggressively insists that it will make no reparation for its ⁴¹⁷ past tort, and that it has a legal right to enjoy in the future all of the benefits secured through an unconstitutional law. If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property.

We may concede the general rule to be that the defendant would not be responsible for the unauthorized and unlawful acts of its officer, done *colore officii*; but when the defendant itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages. The law applicable to a case of this kind is well stated in the case of *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157, as follows: "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by the express vote of the city government, or by the na-

ture of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. . . . The court are therefore of opinion that the city of Boston may be liable in an action on the case where acts are done by its authority which would warrant a like action against an individual, . . . or where, after the act has been done, it has been ratified by the corporation, by any similar act of its officers."

We do not pass upon the constitutionality of Special Laws 1891, chapter 381, relative to the proceeding had by the board of county commissioners, but our opinion in this respect is based upon the concession of appellant's counsel. Points raised by counsel and not discussed in this opinion have been examined and considered, but are deemed immaterial.

Judgment affirmed.

COUNTIES—UNLAWFUL ACTS OF OFFICERS—LIABILITY.—The general rule is, that in the absence of a statute imposing liability, a county is not liable for the tortious or negligent acts of its officers or agents, or for acts clearly beyond their power: *County Commrs. v. Ball*, 22 Colo. 125; 55 Am. St. Rep. 117; *Heigel v. Wichita County*, 84 Tex. 392; 31 Am. St. Rep. 63. With respect to a municipal corporation, it may be held liable for the authorized acts of its officers or agents, where an action on the case would lie against individuals, or for unlawful acts which it has ratified: See note to *Huron Waterworks Co. v. Huron*, 58 Am. St. Rep. 835; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; and this doctrine was applied in the principal case without any analogy being shown between counties and municipal corporations. The distinction between counties and municipal corporations is generally recognized, and, while the conclusion in the principal case seems to be sound, the means by which it was reached appear to be obscure.

FIRST NATIONAL BANK v. SLETTE.

[67 MINNESOTA, 425.]

NEGOTIABLE INSTRUMENTS—WHAT ARE NOT—PAYMENT IN BILLS OF EXCHANGE.—An instrument in the general form of a promissory note, but made payable by bills of exchange, instead of in money, is not a promissory note, and is not negotiable.

DEFINITIONS—MONEY.—BILLS OF EXCHANGE are not money, and commercial usage, whereby they are regarded as money, cannot make them such.

Action upon the obligation set out in the opinion. The court directed a verdict for the plaintiff, and the defendants, Slette and another, appealed from an order denying a motion for a new trial.

Carmody & Leslie and F. H. Peterson, for the appellants.

Calkins & Sharpe, for the respondent.

427 **START, C. J.** This action is based upon an obligation, which is substantially in these words:

"\$1,673.

Halstad, Minn., July 26th, 1894.

"For value received, we promise to pay to the order of the John Good Cordage & Machine Company the sum of sixteen hundred and seventy-three dollars, as follows: Payable by New York or Chicago exchange. \$560, Nov. 15th, 1894; \$560, Dec. 1st, 1894; \$560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid."

The only question on this appeal is, whether this is a negotiable instrument under the law merchant. It is absolutely essential, in order to constitute a promissory note under the law merchant, that the promise be to pay in money. If this instrument can be construed as an absolute promise to pay in money, sixteen hundred and seventy-three dollars, with exchange, it is negotiable; otherwise not: *Hastings v. Thompson*, 54 Minn. 184; 40 Am. St. Rep. 315.

The case of *Bradley v. Lill*, 4 Biss. 473, is the only one to which our attention has been called where the language of the instrument was similar to the one under consideration. In the case referred to the note was made in Chicago, and was payable at New York, "in" exchange; and it was held that the note was negotiable, upon the ground that the promise was to pay the sum named in the note, "with" exchange, which was a mere incident to the debt.

In the case at bar, the note is not payable at any particular place, and the promise is, not to pay a given number of dollars

in money "with"—that is, plus—the current rate of exchange, but it is to pay the sum named in the note by New York or Chicago exchange. The holder of this instrument cannot demand in payment thereof sixteen hundred and seventy-three dollars in money, plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago. Nor can the maker tender in payment sixteen hundred and seventy-three dollars in money, with the cost of exchange; for his promise is to make payment by inland bills, which he must purchase in the market. The instrument, then, is not payable in money, and is, therefore, not a promissory note, within the law merchant: *Easton v. Hyde*, 13 Minn. 83 (90); *Jones v. Fales*, 4 Mass. 245; *Irvine v. Lowry*, 14 Pet. 293; 1 *Daniel on Negotiable Instruments*, secs. 55, 56; *Tiedeman on Commercial Paper*, sec. 29; 1 *Randolph on Commercial Paper*, sec. 90. In reaching this conclusion, we have not been unmindful ⁴²⁸ of the fact that, in commercial usage, bills of exchange are regarded as substitutes for money; but this usage cannot make them such.

Order reversed, and a new trial granted.

NEGOTIABLE INSTRUMENTS MUST BE MADE PAYABLE IN MONEY.—A promissory note is a written engagement to pay absolutely and unconditionally a certain sum of money: *Kendall v. Parker*, 103 Cal. 319; 42 Am. St. Rep. 117, and note; *Gay v. Rooke*, 151 Mass. 115; 21 Am. St. Rep. 434. A promise to pay a sum certain "with current rate of exchange" is not a promissory note: *Note to Hastings v. Thompson*, 40 Am. St. Rep. 319.

MONEY IS A GENERIC TERM AND COVERS everything which, by consent, is made to represent property: *Estate of Jacobs*, 140 Pa. St. 268; 23 Am. St. Rep. 230.

TRUESDALE v. FARMERS' LOAN AND TRUST COMPANY.

[67 MINNESOTA, 454.]

MOTIONS AND ORDERS—RES JUDICATA.—In determining a motion, after a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion and an order made in conformity therewith, affecting a substantial right, and appealable, is an adjudication binding upon the parties, and conclusive as to the point determined.

MOTIONS AND ORDERS—RES JUDICATA—ORDER FOR PAYMENT OF COUNSEL FEES.—If an order is made, in proceedings to compel the foreclosure of a railway trust deed or mortgage, given to secure certain bonds, allowing fees to the counsel who represents the trustee named in such deed or mortgage, as well as the bondholders, for less than the amount claimed, and the amount

allowed is directed to be paid over to such counsel, by order of the court, which then sets apart, out of trust funds in such proceedings, and directs to be paid to a trust company, money to meet interest on bonds held by the parties whom the counsel has represented in the proceedings named, such money is a part of the trust funds, and the order allowing fees is a bar to an action by such counsel for the same services and to impress a lien therefor on the money in the custody of the trust company, notwithstanding a provision in such order that payment of the amount allowed should not preclude a recovery, by the counsel, of further compensation from the persons represented by him. A proceeding to reach funds, in the hands of the court, as part of the trust estate, is not an action against the parties or persons so represented, and does not come within the saving provision of the order.

Action brought by Truesdale against the Farmers' Loan and Trust Company, and others, to recover a balance for counsel fees. The Philadelphia Trust, Safe Deposit, and Insurance Company, and other defendants, appealed from an order denying a motion for a new trial.

C. D. and Thomas D. O'Brien, for the appellants.

J. B. Atwater, James W. Lawrence, Keith, Evans, Thompson & Fairchild, and Davis, Kellogg & Severance, for the respondents.

⁴⁵⁵ COLLINS, J. Prior to the year 1888, the Minneapolis & St. Louis Railway Company executed and issued its bonds to the amount of one million one hundred thousand dollars, secured by its trust deed, to the defendant the Farmers' Loan & Trust Company. The bonds were negotiable, passing from hand to hand, and some of them are now owned by the defendants in this action who have taken this appeal. In 1888 certain litigation was instituted by Henry Seibert against the railroad company, in which it was sought to force a foreclosure of the trust deed or mortgage above ⁴⁵⁶ mentioned. The Farmers' Loan & Trust Company was made a defendant in that action, and appeared through its attorneys, Messrs. Turner, McClure & Rolston, of New York City, and the plaintiff H. C. Truesdale. The court refused to order a foreclosure of the mortgage held by the trust company, but did decree a foreclosure of certain other subsequent mortgages, under which the property was sold. That action was before this court on several occasions: Seibert v. Minneapolis etc. Ry. Co., 52 Minn. 246; 58 Minn. 39, 53, 58, 65, 69, 72.

In the Seibert suit the court found the amount to which the trust company and its attorneys were entitled, as compensation for their services in that litigation, to be twenty thousand dollars,

making an order for payment, of the import hereinafter stated, and this amount was paid. The bonds held by the appellants ran for forty years. At the time the interest coupons payable in July, 1893, became due, the plaintiff in this action, Mr. Truesdale, instituted an action at law against the holders of the bonds personally, the parties to that action being the same as the original parties to this action, excepting that the Minneapolis Trust Company and the Farmers' Loan & Trust Company were not made defendants in the first action. The defendants prevailed in the action, and on an appeal to this court an order denying a new trial was affirmed, and judgment was duly entered in favor of the defendants: *Truesdale v. Philadelphia etc. Ins. Co.*, 63 Minn. 49. Prior to the entry of judgment, the garnishee asked to be allowed to deposit the money in his hands into court; and an order was made depositing the money with the Minneapolis Trust Company, one of the defendants of this action, in whose custody it still is, and against the paying out of which a temporary injunction has been issued herein.

Immediately after the entry of judgment in the Truesdale case, and about December, 1895, the plaintiff brought this suit upon the same cause of action against the same defendants, with the exceptions we have mentioned, in equity, however, and asked that he be given judgment for the amount due him on account of his services and expenses, and that said judgment be declared a lien upon the funds in the possession of the Minneapolis Trust Company, and be paid therefrom, and if sufficient funds be not found in the hands of the Minneapolis Trust Company, that the Farmers' Loan & Trust Company be directed to ⁴⁵⁷ proceed forthwith to collect from the bondholders the sum remaining due plaintiff. The defendants who take this appeal appeared and answered, as did also the Minneapolis Trust Company and the Farmers' Loan & Trust Company. The trust companies, however, took no further part in the defense than to see that no liability attached to them. On December 14, 1895, after the commencement of this action, the plaintiff, pursuant to the insolvent laws of the state of Minnesota, made a general assignment for the benefit of his creditors, to Cavour S. Langdon. When the case came on for trial, this fact being suggested to the court, an order was made allowing the assignee and also Messrs. Turner, McClure & Rolston, Mr. Truesdale's associate counsel in the Seibert litigation, to file intervening complaints, the order further providing that the action should proceed in the name of the plaintiff, any recovery which might be had to be paid as the court might afterward provide.

The decision in the first action brought by this plaintiff was placed upon the ground that, as the trustee named in the trust deed had employed plaintiff to render the services without stipulating it should not incur any personal liability, and without professing or undertaking to create a lien on the trust estate for the value of such services, and, further, that, as the trustee was not insolvent, plaintiff could not recover of the beneficiaries of the trust estate, but must look to the trustee for compensation. In this case, brought to enforce an equitable lien upon the trust funds, the court found that during the progress of the Seibert case the court made an order directing that the receiver pay to plaintiff, on account of his services, the sum of five thousand dollars, which was paid; and that, at the time of the findings of fact and conclusions of law in that case, there was allowed to the attorneys of the trustee the further sum of fifteen thousand dollars, out of the funds in the hands of the receiver. And thereafter the court made its order directing the payment of that sum to plaintiff, to which order we shall hereinafter refer. The payment was duly made out of the general funds in the receiver's hands, and not out of the moneys to which the bondholders were or could be entitled. It also found that plaintiff's services in protecting the interests of these bondholders in the Seibert litigation were of the value of fifty thousand dollars, and that he had necessarily expended in and about the matter the sum of three thousand three hundred dollars. Judgment was ordered for the difference between what had been paid and the value of the services, with the sum so expended, and ⁴⁵⁸ this was made a lien on the fund in the hands of defendant Minneapolis Trust Company. This appeal is from an order denying defendant bondholders' motion for a new trial.

A consideration of the assignments of error which assail the first conclusion of law and the findings upon which it must have been based will dispose of plaintiff's case, a reversal of the order appealed from, with directions to enter judgment in defendants' favor, being inevitable. The conclusion was, that plaintiff was not barred from recovering in this action by reason of the allowance made to and accepted by him in the Seibert foreclosure proceedings.

On the trial, defendants introduced in evidence a petition filed in the Seibert foreclosure proceedings by defendant the Farmers' Loan & Trust Company, the trustee named in the trust deed made to secure defendant bondholders. This petition was made by plaintiff Truesdale and the firm of Turner, McClure & Rol-

ston, intervenors herein, as attorneys for and in behalf of said trustee. It set forth in detail the interest of the trustee in the Seibert litigation; the employment of these attorneys to protect said interest; the object and purpose of the defense made as against plaintiff Seibert, and also as against an intervening complaint filed in that action by one Griggs; that pending the litigation these attorneys prepared and filed a complaint in an action in which the petitioner, as trustee, was named as plaintiff, for the purpose of foreclosing the trust deed and also papers moving for the appointment of a receiver in said action. To state it concisely, this petition exhibited in a very circumstantial manner this plaintiff's claim for compensation for himself and Turner, McClure & Rolston in all matters connected with the Seibert litigation; and it included compensation for the services, and for the money expended, upon which plaintiff relied in the present action. It stated that, by reason of the facts, the petitioner had become liable to its attorneys in the sum of fifty thousand dollars for services, and was also liable for the money necessarily expended by them; that such services were of the value of fifty thousand dollars, no part of which had been paid except five thousand dollars paid out of the trust funds by order of the court, and of which mention has already been made. By reason of the statements in the petition, the petitioner prayed for a further allowance of forty-five thousand dollars, and for an order directing the receiver to pay that sum to it, as and for its compensation, and for the liability and expenses so incurred. To this petition was attached the affidavit of this plaintiff 459 of the same general import, alleging necessary and proper expenditures in the sum of fifteen hundred dollars. This was supplemented by the affidavit of Mr. Turner, of the firm of Turner, McClure & Rolston, as to the extent and value of the services rendered, including an imperfect memorandum showing items of services rendered in New York from July 10, 1888, to April 12, 1893. Mr. Turner also sought to impress upon the court the fact that, for various reasons, it was a case in which liberal compensation should be awarded counsel, as well as fees to the trustee.

The court acted upon this petition and the attached affidavits, so much of its conclusion of law in the foreclosure proceedings, as relates to the allowance of attorneys' fees, reading as follows: "13. Upon the showing made to the court in respect to the reasonable charges for attorneys and counsel employed in this action by the several trustees of the different mortgages described

in the complaint, there is allowed to the attorneys and counsel of the Farmers' Loan & Trust Company of New York, defendant, trustee of one of the mortgages, in addition to the sum of five thousand dollars, heretofore allowed and paid to them, the further sum of fifteen thousand dollars."

Later, counsel moved for an order directing the receiver to make this payment, expressly reserving all rights which they might have against other persons for further compensation. On the hearing of this motion, an order of the court was made, directing such receiver to pay over to the trustee or to plaintiff, as its attorney, the sum of fifteen thousand dollars, out of the earnings and income of the property in his hands. This order concluded as follows: "And it is further ordered and adjudged that such payment to said trust company, or to said Hiram C. Truesdale, its attorney, shall not be construed, and shall not be a waiver of any rights that it or its attorney may have against the persons or parties whom they represent and have represented in this matter to such further compensation for their services and expenses, respectively, over and above the said amounts so allowed by this court; and that this order is made and any money paid hereunder shall be without prejudice to any such rights."

From an examination of the petition and the affidavits, it is obvious that the whole matter was before the court when it made its conclusion of law in the Seibert case, awarding to plaintiff the additional sum of fifteen thousand dollars, all that it considered the petitioner and its counsel were entitled to on the showing made. The court passed upon the claim for an allowance of fifty thousand dollars for the identical services on which this ⁴⁶⁰ action was founded. It determined that the trustee was entitled to twenty thousand dollars in all, and no more, out of the trust estate, and as compensation for its services. The petitioner, by its counsel, accepted this allowance as in full for his claim against the estate when they applied for and obtained the order directing payment by the receiver. In so far as the trust estate was concerned, it is apparent that this was a final adjudication of the claim for attorneys' fees, and that the proceeding as conducted and concluded was a bar to a distinct and independent action to recover additional compensation for the same services. The application and petition for fees and allowances in the Seibert case were analogous to a motion in the ordinary civil action.

In the case of *Heidel v. Benedict*, 61 Minn. 170, 52 Am. St. Rep. 592, it was stated that the determination of a motion is not

res judicata, so as to prevent the parties from drawing the same matters in question again in an action. But on petition for re-argument it was said that, possibly, this statement was too broad, and not universally true under our practice. The correct rule is, that in the case of an order affecting a substantial right, and appealable, when a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion is an adjudication binding upon the parties, and conclusive to that extent: *Dwight v. St. John*, 25 N. Y. 203; *Riggs v. Pursell*, 74 N. Y. 370. This rule is directly applicable to the facts in the case at bar, and precludes the maintenance of an action designed to reach any part of the trust funds.

The question therefore is, Was this such an action? Of this there can be no doubt, for replying to the contention of defendants' counsel that the funds upon which plaintiff is trying to impress a lien for services are not part of the trust estate, but have been set apart, and are now the individual property of the owners and holders of the interest coupons for the payment of which the court has directed that they be appropriated, counsel for plaintiff insist that it is nothing more than a proceeding or an independent action to enforce equitable rights in a fund still in the possession or under the control of the court as a part of the trust estate. The very foundation of their case, whether it is a proceeding in the *Seibert* case or an original action, independent of that, is based upon the contention that the funds upon which a lien is sought are quite as much under the dominion of the court as they were prior to the making of the order setting them apart for a specified purpose. So ⁴⁶¹ that the case is precisely in the situation it would have been had it been instituted before that order was made.

But it is urged that the order of the court upon which plaintiff received the allowance of fifteen thousand dollars expressly provided that payment should not be construed, and should not be a waiver of any rights that the trustee or its attorneys might have against the parties or persons whom they represented in the *Seibert* action, and hence this action may be maintained. There would be much force in this claim if this action was against the parties or persons so represented. But, as we have said, it is not. It is a proceeding to reach the funds in the hands of the court as part of the trust estate, and does not come within the exception provided for in the order. It is not an action to re-

cover the balance due for services from the parties or persons the attorneys represented in the Seibert litigation.

To conclude: If the funds are still a part of the trust estate, plaintiff is barred by the final order of allowance; and, if the funds in question do not belong to that estate, the plaintiff has no lien upon them which he can enforce in a court of equity.

The order is reversed, and, upon remittitur, judgment will be entered in the court below in favor of defendants.

MOTIONS AND ORDERS—RES JUDICATA.—Orders made upon motions, petitions, or rules affecting substantial rights and from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments or decrees: *Burner v. Hevener*, 34 W. Va. 774; 26 Am. St. Rep. 948; though it is otherwise as to orders and motions made in matters not so far material and final that no review thereof may be had through the ordinary procedure, such as appeals or writs of error: *Note to Heidel v. Benedict*, 52 Am. St. Rep. 597; *Blair v. Anderson*, 58 Kan. 97; 62 Am. St. Rep. 606.

JUDGMENT—RES JUDICATA.—A judgment is conclusive, if on a direct point, though the object of the two suits is different: *Gallaher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942.

OLSON v. SCHULTZ.

[67 MINNESOTA, 494.]

ELEVATORS—INJURIES CAUSED BY DEFECTS—LIABILITY.—If one floor of a business building is leased, the tenant having the use of a freight elevator therein in common with the landlord and tenants, the landlord is answerable for the safe condition of the elevator, where he retains control over it and its approaches, and particularly where he has covenanted to keep the elevator and its approaches in repair. He is answerable for an injury caused by its being out of repair, although he had no knowledge of such defect.

MASTER AND SERVANT—INJURY TO SERVANT—MASTER'S LIABILITY—REMEDY OVER UPON COVENANT.—If one leases premises, and the landlord covenants to keep them in repair, but the lessee's employé is injured by their becoming out of repair, the master is primarily liable to his servant, but has a remedy over against the landlord, on the covenant, to recover the amount which the master or lessee has been legally obliged to pay the employé on account of such injury.

JUDGMENT—RES JUDICATA.—If questions are litigated in an action, the judgment therein is conclusive as to those questions in a subsequent action involving the same subject matter.

JUDGMENT—ELEVATOR ACCIDENT—RES JUDICATA.—If a person leases one floor of a business building, and obtains the privilege of using a freight elevator therein as his necessities may require, the landlord covenanting to keep the elevator and its approaches in repair, but retaining control of the elevator, and one of the lessee's employés is injured by reason of the elevator's getting out of repair, whereupon he sues the lessee for the injury, which ac-

tion the landlord is seasonably notified to defend, a judgment for the employé, entered upon a verdict, is conclusive against the landlord, in a subsequent action against him by the lessee to recover the amount of such judgment and costs, which the lessee has paid, that the elevator was out of repair, that the employé was injured by reason of its defective condition, and as to the amount of damages sustained by the employé.

JUDGMENT—NOTICE TO APPEAR AND DEFEND—RES JUDICATA.—If a landlord, who has covenanted with his tenant to keep a freight elevator on the premises in repair, is given notice of the pendency of an action brought by an employé of the tenant to recover damages for personal injuries caused by the elevator's becoming out of repair, and the landlord is offered an opportunity to appear and defend, which he neglects and refuses to do, he is as effectually concluded by the judgment upon contested questions litigated in such action as if he had appeared and contested those questions upon the merits.

ELEVATORS—NOTICE OF DEFECT—CONTRIBUTORY NEGLIGENCE.—If a person leases one floor of a building, used for business purposes, and secures the privilege of using a freight elevator therein as his necessities may require, the landlord covenanting to keep the elevator and its approaches in repair, but retaining control of the elevator, and an employé of the lessee is injured by reason of the elevator's getting out of repair, whereupon he sues the lessee for the injury, which action the landlord is called upon, by the lessee, to defend, a finding that the lessee's manager had notice, before the accident, that the elevator was out of repair, is not sufficient, in an action by the lessee against the landlord to recover the amount of the judgment against the former, which he has paid, to charge the lessee with contributory negligence in not giving notice of the defect to the landlord, for there was no obligation upon him to give such notice, and the lessee is, therefore, entitled to recover.

Action to recover the amount of a judgment rendered in an action for personal injuries. The defendant appealed from an order refusing a new trial.

Choate & Merrill, for the appellant.

J. F. McGee, for the respondent.

496 BUCK, J. On June 2, 1891, the appellant, Schultz, was the owner of a four-story brick building, with basement, situate in the city of Minneapolis; and on that day he leased the fourth floor of said building, with the privileges and appurtenances thereunto belonging, to the respondent, Olson, for a term of one year, to commence July 1, 1891, for the rental of fifty dollars per month. The third floor of the building was unoccupied, and the remainder of the building was occupied by the North Star Boot & Shoe Company, with equal right to use an elevator in the building in common with the respondent, Olson. This elevator ran from the basement of the building to the top floor, and, when the necessities of each tenant required its use, he fur-

nished his own operator. All the machinery connected with the operation of the elevator was in the basement of the building, except that part of the cable which was in the shaft and overhead the pulleys. Olson leased and used the fourth floor for the purpose of manufacturing overalls and light clothing, and, in connection with this business, used this elevator in carrying freight. The lease, which was in writing, contained a provision: "The lessor is to keep the elevator and approaches in constant repair, and in perfect condition for the lessee's use; provided that, if said premises shall have become untenable without the fault of said lessee, then in that case said lessee shall be released from the obligation of this lease, unless said lessor, after receiving seasonable notice from said lessee, cause said premises to be repaired and put in suitable condition for occupancy within a reasonable time after receiving said notice."

It was also further provided by the terms of the lease that "the lessor may enter at any and all times to view and make improvements and suitable repairs." During the term of the lease the third floor of said building, although unoccupied, was under the control of the defendant, Schultz, and during said term there was a hall and stairway running from the street to the fourth story of said building. On January 12, 1892, one Lyman, an employé of respondent, who operated the elevator when it was used by respondent, had used the elevator, and for ⁴⁹⁷ some purpose stepped from it, leaving the floor of the elevator cage even with the fourth floor of the building, and was absent for some time; and when he returned he found that the elevator platform had crept up some distance, and, when he stepped upon it, it instantly fell to the bottom of the shaft, a distance of about seventy-five feet, injuring said Lyman.

Afterward Lyman brought a suit against the respondent, Olson, in the United States circuit court, to recover five thousand two hundred dollars damages for the injuries sustained by him by reason of the fall of said elevator, alleging that said elevator was defective, unsafe, and out of repair. Thereupon the respondent duly notified the appellant of the pendency of the action, and required him to appear and defend it, but the latter did not do so, whereupon this respondent did duly appear and defend said action, the result of which was a verdict in favor of Lyman for the sum of five hundred dollars, which, with the costs and expenses of the trial, amounted to the sum of one thousand and thirty-eight dollars and sixty-four cents, which respondent paid; and he brought this action to recover from the

appellant the said amount, on the theory that the failure of the appellant to perform his covenant to keep the elevator and approaches in constant repair and perfect condition for the lessee's use resulted in the accident to Lyman on January 12, 1892, and that the respondent, as master, being primarily liable to his servant, Lyman, had a remedy over against appellant on the said covenant to recover the amount he was obliged to pay Lyman. This view of the law was sustained by the trial court, and judgment ordered by it in favor of plaintiff accordingly, and this appeal is taken from an order denying a motion for a new trial.

The counsel for the appellant has devoted considerable space in his brief to a discussion of the question of whether the elevator was out of repair on and prior to January 12, 1892, the date of the accident. We are of the opinion that this question was determined adversely to the contention of the appellant in the former action, and that the judgment entered in that action concludes the appellant herein, as that was one of the very questions litigated in that action. The complaint in the former action of Lyman v. Olson contains an allegation that the elevator was in an unsafe and dangerous condition, and unfit for use, at and for some time prior to the time of the injury to Lyman. We are also of the opinion that the question of Lyman's being injured ⁴⁹⁸ by reason of such defective condition of the elevator, and the amount of damages which he thereby sustained, were settled by the verdict and judgment entered thereon in the former action, and are not now open for discussion or adjudication upon the merits in this action. Schultz had due notice of the pendency of that action, and was afforded an opportunity to appear and defend, which he neglected and refused to do, and he was as effectually concluded thereby as though he had duly appeared therein and contested these questions upon the merits: *Wabasha v. Southworth*, 54 Minn. 79; *Erickson v. Brandt*, 53 Minn. 10.

The most serious question arises upon the fifth finding of the trial court, which is as follows: "That subsequent to the time plaintiff took possession of said premises, and some days prior to January 12, 1892, unknown to the defendant, a bolt in the arm in the top of said elevator cage, through an opening in which the steel cable used in starting and stopping the elevator passed, was lost out, so that said arm, when said elevator reached the fourth floor, would not come against the button fastened to said steel cable, but would allow the same to creep about twelve inches above said floor; but notice of the condition of said ele-

vator was never given to the defendant, and no demand was ever made on the defendant to repair the same. That at the time of said injury, and while said elevator was out of repair, neither the plaintiff nor defendant herein knew the said elevator was out of repair. That plaintiff's factory in said building was under the charge of Mr. Shotwell, who was the manager of said factory on behalf of the plaintiff, and, as such manager, had charge of all the operations carried on by plaintiff in said factory, and of all the workmen employed therein. That said Shotwell, for several days prior to the injury suffered by Lyman, had notice that said arm was out of repair as above stated. That the plaintiff was not in immediate supervision of said factory, and visited the same but two or three times during the term of said lease. That the absence of said bolt or of the arm would not affect the operation of the elevator, or cause it to fall, if the guide strips, being maple strips two by two inches, which should run from the bottom to the top of the elevator shaft, had been properly constructed so as to run to the top of the shaft, thereby preventing the elevator shoes which operate on said guides from getting off the guides and 'hanging up' the elevator cage, by reason of said shoes getting on the top of said guides. That said guide strips did not run to the top of the elevator shaft, but stopped some distance below that point."

In order to determine upon whom the liability rests in this action we may properly consider three points: 1. Who had control and ⁴⁹⁹possession of the elevator and the machinery necessarily connected with its operation, and the right to make constant repairs and keep it in perfect condition for the lessee's use? 2. Was it the duty of the lessor, under the covenants in the lease, to keep the elevator in constant repair and perfect condition, irrespective of the question whether he had notice of its being out of repair? In other words, was he liable for injury resulting from its being out of repair without his having knowledge of such defect? 3. Was Shotwell's notice of the defective condition of the elevator sufficient to charge plaintiff with contributory negligence, in not giving notice thereof to defendant?

The only control or possession which plaintiff had over the elevator was that his operator might stand upon the platform while operating it in carrying plaintiff's merchandise. The other tenants had the same right. So far as appears from the record, the entire machinery connected with the operation of the elevator was under the management and in the possession and under the control of the defendant. The premises designated in

the lease as those rented are "the fourth floor of the four-story brick building known as being 'Numbers 121 and 123 Washington Avenue North.'" The elevator was not leased to Olson, but only its mere use during such time as he needed it to convey his merchandise either up or down. At other times the North Star Boot & Shoe Company or the defendant had a right to its use. Olson's control of the elevator was a mere easement or right to transport his goods back and forth as his necessities occasionally required. It does not appear that the other tenant had any greater right in the elevator.

As the defendant was the owner of the building and elevator, and the third story not rented, the presumption is, that he had the absolute control and possession of the elevator at all times, subject only to the tenant's right of carrying goods as above indicated. Hence, he had the legal right and the actual opportunity to make all necessary repairs and keep the elevator and its machinery in perfect condition, irrespective of the covenant and reserved privilege in the lease to do so. Olson had no right and was under no legal obligation to repair the elevator. He had no right to go to the basement or other stories for the purpose of repairing it, nor, as against other tenants, to stop its running for such purpose.

His right to its use was not exclusive, but a right of passageway in common with the other tenant and the landlord, the latter having general ⁵⁰⁰ control over the elevator; and we are of the opinion that the leasing of the fourth story of the building, under such circumstances, does not exonerate the defendant landlord from responsibility for the safe condition of the elevator under the specific covenant in the lease. It was put there for a specific purpose. The evidence shows the necessity for keeping it in this condition to enable the lessee to carry on his business, and to guard against injury to persons lawfully using it. And this covenant applies to the condition in which the landlord was to keep the elevator during the term of the lessee's lease. It did not concern the lessee as to the condition of the elevator at the date of the lease, June 2, 1891, but it was of vital importance to him as to its condition during the year for which he rented the premises, commencing July 1, 1891.

There is no merit in the contention of appellant's counsel that the elevator was to be kept in the same condition as when the lease was executed. Such a construction is not within the spirit or language of the lease. To keep an elevator and approaches in constant repair and perfect condition for the lessee's

use does not mean that it may be in a defective and unsafe condition at the commencement of the lessee's term, and that it may be permitted to remain so, continually endangering human life. If it was not in repair and perfect condition, it was the duty of the landlord to put it in that condition at or before the commencement of the lease, and keep it so during the term: *Myers v. Burns*, 35 N. Y. 269-271.

Nor was it necessary to show that the defendant had actual knowledge of the defect. His duty was that of care, and ignorance of the defect was no defense: *Lindsey v. Leighton*, 150 Mass. 285; 15 Am. St. Rep. 199, and cases there cited. This obligation is the result of an express contract between the parties, the landlord reserving to himself the control over the elevator, and the right and obligation to repair it and keep it in repair, and the lessee having no control over it except at times when he was occasionally actually using it. The right to use the elevator had been divided by the landlord among different tenants and himself for the purpose of making money for himself, and for this purpose he had made a passageway common to all, as an inducement and accommodation to those leasing the premises; and the tenant, under the contract, was not bound to repair, but the landlord, by an express contract, had agreed to do so. If we should apply the ⁵⁰¹ rule as settled in some jurisdictions, that the obligation to repair depended upon the right of possession, the defendant would still be liable; but, in addition to this liability, there is one by express contract. In the case of *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, it was ruled that: "Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair. As to such portion he still retains the responsibilities of a 'general owner to all persons, including the tenants of his building.' The case shows that the plaintiff had a simple right of access to the shed over this staircase, as incident to her occupation of the premises leased to her. The duty of the defendant, having still the possession and control of the same, was to protect her from injury in that right, by the use of reasonable care on his part. The stairway was apparently intended to furnish a passageway for her use, and the defendant is responsible for injuries received by one entering upon the same by his invitation or procurement, express or implied:

Sweeny v. Old Colony etc. R. Co., 10 Allen, 368; 87 Am. Dec. 644; Elliott v. Pray, 10 Allen, 378; 87 Am. Dec. 653. The fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care: Whittaker v. West Boylston, 97 Mass. 273; Reed v. Northfield, 13 Pick. 94;" 23 Am. Dec. 662.

In the case at bar, it is conceded that Olson had no actual notice of the defective condition of the elevator, and his right of action is challenged upon the ground that Shotwell, the manager of Olson's factory, knew that the elevator was out of repair, and that such knowledge on the part of Shotwell is in law imputable to Olson, and hence, that Olson's contributory negligence precludes his recovery against Schultz. But the failure to bind Olson in this respect rests upon the insufficiency of the finding of acts. Shotwell was the manager of the factory and its operations and in charge of the workmen employed therein, but not of the elevator. It nowhere appears that he had any control, possession, or management over the elevator or over Lyman, who operated it occasionally.

The finding of fact by the trial court is that Shotwell knew that a bolt in the arm of the elevator case, through an opening in which the steel cable used in starting and stopping the elevator passed, was lost out, so that said arm, when the elevator reached the fourth floor, would not come against the button fastened to said steel cable, but would allow the same to creep about twelve inches above said floor. This is ⁵⁰² the extent of Shotwell's knowledge or notice of any defect in the elevator. This alone was not the cause of the injury to Lyman, nor did Shotwell know or have reason to believe that this condition of the elevator was dangerous, in its use, either to person, life, or property. In fact, the trial court found that the absence of said bolt or the arm would not affect the operation of the elevator or cause it to fall, if the guide strips (being maple strips two by two inches) had been properly constructed so as to run to the top of the shaft, thereby preventing the elevator shoes which operated on the guides from getting off the guides and hanging up the elevator cage by reason of the shoes getting on top of the guides, and that said guide strips did not run to the top of the elevator shaft, but stopped below that point.

Shotwell did not have the slightest knowledge or notice of these facts, the existence of which constituted the primary cause of the injury, and were evidently defects which existed in the

original construction of the elevator, and chargeable to the owner of the building. Such being the case, the owner is presumed to know of these defects, and notice thereof need not be given him, to render him liable. Certainly a tenant who has no knowledge of such defects, and is not bound to know them, is not chargeable with negligence in not giving the landlord notice thereof. The facts, therefore, fail to show any knowledge upon the part of Shotwell, as manager of Olson, which could be imputed to the latter, and conclude him from maintaining this action, upon the ground of contributory negligence.

Some controversy has arisen upon the phraseology found in the original lease, which we have examined, and have no hesitation in saying that the notice therein required to be given by the lessee in case the premises became untenable relates to the fourth floor, rented for business purposes, and not to the elevator; and the covenant to keep in constant repair and in perfect condition relates only to the elevator, and binds the landlord to keep it in that condition, without notice being required on the part of the lessee of any defects existing therein.

Our conclusion is, that the order denying the motion for a new trial should be affirmed, and it is so ordered.

ELEVATORS—CARE—LIABILITY OF OWNER.—If an elevator remains under the control of the owner of the building, he is liable to his tenants for any defect in it, or in its appointments or management, which reasonable care and vigilance can prevent; and those who have a right to use it may assume that this duty has been faithfully performed, without being required to exercise that degree of care and caution which could properly be demanded of them, under other circumstances: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403, and note.

JUDGMENT—RES JUDICATA.—A judgment is conclusive, if on a direct point, though the object of the two suits is different; *Gallaher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942.

ALLEN v. MINNESOTA LOAN AND TRUST COMPANY.

[68 MINNESOTA, 8.]

HUSBAND AND WIFE—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute providing that, "when a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had," is not unconstitutional as depriving the husband of his property without due process of law; and under it, the deserted wife may maintain an action to recover for the support and maintenance of a minor child who resided with the family prior to such desertion.

H. Barton, for the appellant.

W. J. Hahn and J. M. Martin, for the respondent.

^s BUCK, J. About February 11, 1888, the defendant was appointed guardian of the person and estate of Edith M. Allyn, a minor, and it continued such guardian up to the time of the commencement of this ^u action, the parents of said Edith M. Allyn having died prior to February 1, 1888. She was in no way related to said William H. Allen or his wife. During many years prior to March 19, 1895, William H. Allen, who is designated in this action as plaintiff, and Anna L. Allen, who is designated herein as his deserted wife, were husband and wife, living and cohabiting as such, and from about the month of February, 1888, until said month of March, 1895, they supported and cared for the said Edith M. Allyn during nearly all the time of such guardianship, substantially as though she were their own child; but they were never paid therefor, except that the defendant claims it paid for the clothes and school-books of said ward.

About the month of March, 1895, said William H. Allen deserted his said wife, and has ceased to live with, support, or care for her, and never returned to her, and his whereabouts have never since been known to his said wife. About the same time Edith M. Allyn left the home of said Allens, and her whereabouts do not appear to be known to defendant or said Anna L. Allen, and the latter, using the name of her husband as plaintiff, seeks to recover of the defendant the value of the expense of supporting and caring for said minor child, and to this end this action is commenced, and entitled "William L. Allen, by Anna L. Allen, his Deserted Wife," basing her right to do so upon General Statutes of 1894, section 5165, which reads as follows: "When a husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had."

When the cause was reached for trial in the court below, a motion for judgment on the pleadings in defendant's favor was granted, but subsequently amended to read as follows: "Ordered, that defendant's motion for judgment in defendant's favor on the pleadings be, and the same is, hereby granted, in this, that the complaint be dismissed, without costs and without prejudice to said William H. Allen or his assigns prosecuting against this defendant any action that may be for the same alleged cause of action, and without prejudice to the rights of said William H. Allen or his assigns in said alleged cause of action, or any part thereof."

The grounds upon which defendant challenges the right of the deserted wife to maintain this action are as follows: 1. If this action ¹⁰ is an action by and through which the wife seeks to collect the amount claimed of defendant by simply prosecuting the suit in the name of the husband, and it can be maintained that that is what the section under consideration authorizes, then the act in question is unconstitutional, as depriving the husband of his property without due process of law; 2. That if that is not what this section means, then it can only mean what it was construed to mean by the court below, viz, that the action must concern the property rights of some remaining member of the family, and that it is only in such cases where it is necessary to enforce or defend such rights that an action of this kind can be prosecuted; that it does appear on the face of the complaint that this action does not involve the enforcement of any such right; 3. The complaint is bad, in that it fails to show facts necessary to constitute a desertion within the meaning of the law.

We do not assent to the proposition that the law is unconstitutional. There is no attempt to deprive the husband of his property without due process of law. The statute does not authorize the taking of the private property of the husband, and transferring it to the wife. It simply authorizes her to maintain his rights by an affirmative proceeding in his name, or defend them in the same manner. If she succeeds, the fruit thereof does not belong to her, but to him. The language of the statute does not in the slightest degree authorize any other construction. In all actions or proceedings he is the principal named, and she is the legally authorized agent to save his rights or property. The rights existing as between husband and wife are not those in controversy. Her claim or rights in the proceeding are not adverse to his, but in aid thereof. It is true her

own rights might, in some cases, be jeopardized by inaction upon her part; but one effect of the law would be to maintain or protect his rights.

If it be said that the proceeding seeks to bind him without his knowledge or consent, we answer that it is no more so than where the innocent wife pledges the credit of her husband for suitable necessities, when the husband, without cause, has deserted her, or turns her out of their home, and she is without other means of obtaining such necessities, and in this respect she binds him as agent. In such case his misconduct gives to her act the presumption of the authority of law, and, if the facts sustain the presumption, it is irrebuttable. There may be a delegation of agency or authority created by law as ¹¹ well as by the real act of the person. By contracting the relation of husband and wife, he takes upon himself the duty of supplying her with necessities, and if, through his own fault, he does not, she, by reason of the marriage relation, has the implied authority as his agent to procure such necessities and the husband is responsible for what is so supplied. It might just as well be said that this is taking and transferring his property to some one else without due process of law as to say that this is the effect of the statutory law under discussion. It was the common law that clothed the wife with this authority to procure necessities under such circumstances, but in the case at bar it is the positive enactment of a legislative body delegating this power to the wife, as agent of her husband, in case of his misconduct.

If such power was attempted to be delegated by the legislature to one person to prosecute or defend in the name of a stranger any action which he might prosecute, with the same rights therein as he might have had, we are not prepared to say that it would not be unconstitutional, especially where the relation of guardian and ward did not exist. The insane, idiotic, spendthrift, and infants are notable instances where persons are appointed to care for them, and bring or defend actions in their behalf, without their knowledge or consent. Such proceedings were never supposed to authorize the transfer of their property without due process of law, nor that they so operated in law or fact. These laws are for the protection of the unfortunate, sometimes to govern the vicious, and generally to uphold public welfare.

Now, when a man enters into the marriage relation, he yields to the changed condition imposed upon him by law. While he enjoys its benefits, he cannot disregard its obligations, either

private or public. It was once wittily said that, in the eye of the common law, upon marriage the husband and wife became one, and that one was the husband. But the fiction of the common law, with much of its harshness and injustice, has been done away with by more sensible and humane legislative enactments giving the wife greater personal freedom and equality of property rights. This statutory provision is in line with the trend of such statutory laws.

Many instances might be given where the rights of the family would be entirely destroyed or greatly lessened if the wife could not prosecute or defend in the name of the husband. Suppose his title ¹² or rights in the homestead were attacked by action, and, by reason of his desertion of his family, he did not, or would not, defend, her own and the children's valuable property rights therein might be seriously jeopardized, or entirely lost, if she was not allowed to defend in his name, as authorized by this law. The same might be said of other property, real or personal. Again, suppose that a trespasser was committing waste upon the homestead or other real property, or destroying the crops upon which the support of the family depended; must the wife remain inactive and powerless? We think that the highest considerations of public policy, as well as the family welfare, demand that this should not be permitted. The wrongdoer should not be thus permitted to succeed by reason of the misconduct of a faithless husband deserting his family without just cause.

The act is not intended to concern merely the property rights of some other member of the family than the wife, but is broad enough to, and does, authorize the wife to prosecute or defend such actions as he might, in case of such desertion, personally prosecute or defend. In name and as plaintiff he is the real party in interest, and, if he sees fit voluntarily and willfully to violate his marital obligations, then the irrebuttable presumption of law arises that he has cast upon his wife a delegated authority as his agent, not only to protect his right, but that of the family, as the latter's rights may very materially depend upon those of the husband. Continued desertion for a certain period would ripen into a cause of divorce in behalf of the wife, in which case she might be entitled to one-third in value of the real and personal property of the husband, and the minor children to their support out of his property. Such property should not be permitted to be lost or sacrificed through the willful desertion of

the husband, and, in our opinion, the beneficent provisions of the law do not permit it.

The amount involved here is the sum of three thousand dollars, which, it is claimed, accrued not merely by reason of the services rendered by the husband, but by his wife as well, for the support and care of this young girl, commencing when she was nine years old, and extending over a period of about seven years. The defendant, in order to avoid any liability, pleads as one of its defenses the statute of limitations as to part of the claim; thus showing the necessity of prompt action upon the part of the deserted wife if she would save the right of action for the recovery ¹³ of the amount which she claims is justly due her husband, and of which she has evidently earned a good share, if the claim is a valid one. This rule, which we think applicable to this case, does not extend so far as to authorize the wife to dispose of the husband's property unless, perhaps, for necessities for the family. Nor, in case of an action in his name for the recovery of property or damages for injury thereto, would she have any greater or any more of a vested right therein than she had before the desertion. The General Statutes of 1894, section 5165, makes her the statutory agent of the husband for certain purposes, and the fact that she must proceed in his name directly and irresistibly repels the idea that the fruits of any affirmative or defensive action are to belong to any person other than the husband. His desertion strengthens or adds to the power of the wife to act in his behalf, and protect and preserve the property left in her implied care; and hence with the right to prosecute or defend actions relating thereto. And by analogy she would have the right to prosecute an action of the character of the one at bar.

While several of the states have statutory enactments substantially the same as our own, we have not been able to find any decision bearing directly upon such laws, nor have we been cited to any by either of the respective counsel. In 1 Bishop on Marriage and Divorce, sixth edition, chapter 33, the general rule is laid down that, commonly, the presumption is, that the wife may protect and preserve the property left in her implied care, but neither sell nor destroy it; yet in some circumstances even the power of preservation implies some power of disposition. Thus, a husband being away on military service, proceedings being instituted to confiscate his property, the wife may employ counsel, and make the proper and usual defense, and charge him therefor: Citing *Buford v. Speed*, 11 Bush, 338. He also cites the

case of *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532, where Judge Redfield lays down the law to be that, in the absence of one from the country for months, leaving his wife and minor sons upon his farm, the wife is considered to be the head of the family, and a general agent of the husband, and her rule extends to the ordinary incidents of the business.

The act under consideration enlarges the authority of these rules of the common law, and, while there may be no justification for the misconduct of the husband, yet where, for instance, he leaves uncollected debts or property in the care of the wife, the presumption ¹⁴ would arise that he meant she had the power to preserve the property and collect the debts. When to this presumption is added the express legislative authority, which he is also presumed to know and understand, and assent to by his willful desertion, there can be no reasonable doubt but what the law is valid and constitutional.

We are also of the opinion that the complaint states a good cause of action.

Order reversed.

START, C. J., and COLLINS, J., dissenting. We dissent. The statute in question, like every other which is couched in general terms, is necessarily subject to implied exceptions founded in maxims of natural justice. It must be construed so as to give effect to the beneficent purpose for which it was enacted, which was the protection of the deserted wife and family, and not for the protection of the absconding husband. It must not be construed so that either the debtor of the husband will be subjected to the liability of paying his debt twice—first to the wife, second to the husband—or that the husband must be deprived of his property without an opportunity to contest the charge of desertion in a court of justice. We are therefore of the opinion that the statute should not be construed as extending to actions for the collection of choses in action of which the husband is the absolute owner.

HUSBAND AND WIFE—RIGHTS OF WIFE DESERTED BY HUSBAND.—The law confers on a wife the power to contract and sue as feme sole, where her husband leaves the state with intent to abandon her and not to return, and remains absent therefrom more than five years: *Mead v. Hughes*, 15 Ala. 141; 50 Am. Dec. 123, and note; monographic note to *Arthur v. Broadnax*, 37 Am. Dec. 710-712; *Krebs v. O'Grady*, 23 Ala. 726; 58 Am. Dec. 312; *Phelps v. Walther*, 78 Mo. 320; 47 Am. Rep. 112; *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137; *Wright v. Hays*, 10 Tex. 130; 60 Am. Dec. 200, and note.

CZECH v. GREAT NORTHERN RAILWAY COMPANY.

[68 MINNESOTA, 38.]

RAILROADS—PRIVATE CROSSINGS—WARNING—REASONABLE CARE.—A statute requiring a locomotive bell to be rung or the whistle sounded before a railway train crosses a traveled road or street does not apply to private farm crossings; but it does not follow that a railway company never, under any circumstances, owes a duty to the adjacent landowner to give a signal or warning of an approaching train. It merely leaves the question to be determined on common-law principles, whether under the circumstances of the case, reasonable care would have required the giving of such warning.

RAILROADS—PRIVATE CROSSINGS—WARNING—NEGLECT.—While there is no statutory obligation on a railroad company to give a signal of the approach of a train to a private crossing, yet the condition of the crossing as a peculiarly hazardous one, for any reason, coupled with the high rate of speed at which a train is running, may render the case one where reasonable care requires that some warning signal be given, and, in such case, the question of negligence on the part of the railway company in failing to give such warning is for the jury to determine.

W. E. Dodge, for the appellant.

F. D. Larrabee, F. E. Latham, J. J. Wooley, and J. C. Tarbox, for the respondent.

⁴⁰ MITCHELL, J. The plaintiff brought this action to recover damages for personal injuries sustained by reason of a collision with one of defendant's passenger trains at a private crossing on plaintiff's farm. The negligence alleged and relied on at the trial as the ground of plaintiff's right of action was that the train approached the crossing at a high and dangerous rate of speed, without any signal or warning being given of its approach.

The only question in the case worthy of special consideration is whether the evidence justified a verdict for the plaintiff. The case made by the plaintiff was by no means a strong one, but, after carefully examining and re-examining the evidence, we have arrived at the conclusion that it made a case for the jury; in other words, that we cannot hold, as a matter of law, either that the defendant was not guilty of negligence, or that the plaintiff was guilty of contributory negligence.

The crossing was immediately east of a "cut" on defendant's road over eight hundred feet long, and varying in depth from nearly six feet at the east end to nearly eleven feet at the center, or deepest point. The defendant ⁴¹ had permitted trees and brush to grow and remain on the sides or slopes of this cut, which materially added to the obstruction to the view westward. The crossing was, therefore, an exceedingly dangerous one to a per-

son approaching it from the north, because of his inability to see trains coming from the west until he reached a point very near the railroad track. Plaintiff was about to drive his team, hitched to a farm wagon, from his house, on the north side of the railroad, over this crossing, to that part of his farm on the south side.

He testified that, when he reached the gate in the railway fence (a distance of about sixty odd feet from the track), he stopped his team, went down upon the railroad track, and looked both east and west, but neither saw nor heard any train. The evidence shows that, if he did this, he would have a view of the track westward for a distance of from sixteen hundred to eighteen hundred feet. He further testified that he then drove through the gate upon the right of way, and, before crossing the track, stopped his team and listened for a train, and, hearing none, then drove on, still looking and listening, but that he neither saw nor heard the train until it was within about one hundred feet of him, when his horses were already on the track. His testimony was corroborated by that of his daughter, who was riding in the wagon with him. There are some circumstances which tend to create doubt as to the entire accuracy of this testimony, but its credibility and weight were questions for the jury.

Notwithstanding that this was a private crossing, where the defendant was neither accustomed, nor required by statute, to give signals of the approach of trains, and although it appears that plaintiff was entirely familiar with the situation, and knew that this train was due from the west at or about this time, we could not hold, as a matter of law, that he was guilty of contributory negligence, if his testimony and that of his daughter was true, which was a question for the jury.

2. The remaining question is whether the evidence justified the jury in finding that the defendant was negligent. We agree with counsel for the defendant that the statute requiring a bell to be rung or a whistle to be sounded at least eighty rods from the place where a railway crosses a "traveled road or street" on the same level does not apply ⁴² to private farm crossings. It only applies to public roads; that is, roads traveled by the public. A mere farm crossing, designed exclusively for the convenience of the adjacent landowner, is never spoken of, either in the statutes or in common speech, as a "road." Probably, the object in using the term "traveled road," instead of "highway" or "public highway," was to include roads actually used and traveled as public highways, without regard to whether they have been legally laid out or dedicated as such.

But it does not necessarily follow from this that a railway company may never, under any circumstances, owe a duty to the adjacent landowner to give a signal or warning of an approaching train. It merely leaves the question to be determined on common-law principles, whether, under the circumstances of the case, reasonable care would have required the giving of such a warning.

It may be conceded that, as a general rule, and under ordinary circumstances, a railway company owes no duty to the adjacent landowner to give him a warning signal, or to slacken the speed of its trains, on approaching a private crossing. The necessities of public travel and of the railway company would not permit of this; and when such a crossing is put in for the convenience of an adjacent landowner, although he has, of course, a legal right to its reasonable use, he must take it subject to the risk or burden incident to this condition of things. But reasonable care means the degree of care commensurate and corresponding with the situation. While in certain respects the rights of the adjacent landowner to use the crossing must, from the necessities of the case, be subordinate to the rights of the railway company to use its road, yet the rights and duties of each are correlative and reciprocal; and, in exercising its or his right, each must bear in mind the right of the other to use it also, and use reasonable care to avoid injury to such other while in the exercise of such right.

Therefore, while there is no statutory obligation on a railroad company to give a signal of the approach of a train to a private crossing, yet the condition of a crossing as a peculiarly hazardous one, for any reason, coupled with the high rate of speed at which a train is running, may render the case one where reasonable care would require that some warning signal should be given: *Thomas v. Delaware etc. Ry. Co.*, 8 Fed. Rep. 729. In the present case, this crossing was, for the reasons already⁴³ stated, a peculiarly dangerous one. This was, or ought to have been, fully known to the defendant and its servants. They knew that plaintiff was liable to be using the crossing.

There was evidence that would justify the conclusion that this train, although on schedule time, was running at an unusual rate of speed. We attach very little weight to the mere opinions or estimates of nonexpert bystanders or passengers to that effect, but the case furnishes evidence of a more satisfactory character. The testimony of the engineer is, that the schedule time of the train, including stoppages, was about twenty-seven miles an

hour, and that its usual actual running time between stations was about thirty miles an hour. It was a regular passenger train, presumably supplied with all the usual modern appliances, such as air-brakes. The engineer testified that he knew of the collision the moment it occurred, and immediately applied the brakes with full force. But there is evidence tending to prove that the engine ran over nine hundred feet past the crossing before the train was brought to a full stop. We refer to the testimony of the measurement of the distance from the crossing to the place where the broken glass was found which was taken out of the cab window after the train stopped. There is no evidence that the grade was a descending one, or that the track was wet or slippery. This, corroborated as it was by some other evidence, would, we think, have warranted the jury in finding that the train was running at an unusually high rate of speed.

Considering the peculiarly dangerous nature of the crossing, and the high rate of speed at which the evidence tended to show that the train was running, we think it was a question for the jury whether the defendant was negligent in not giving some warning signal, and hence we cannot say that their verdict is not supported by the evidence.

In response to some questions of pleading raised by counsel, we may add that while the complaint was evidently drawn on the theory that the statute imposed a duty on defendant to give a signal on approaching the crossing, and also that its custom previously had been to give such a signal, yet its allegations are broad enough to entitle the plaintiff to recover on common-law grounds, and irrespective of the existence of the custom referred to.

Order affirmed.

RAILROADS—DUTY TO GIVE SIGNALS AT CROSSINGS—PRIVATE CROSSINGS.—The statutory requirements as to giving signals and checking the speed of railroad trains do not require this to be done upon the track elsewhere than at a public crossing: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145; *Shackelford v. Louisville etc. R. R. Co.*, 84 Ky. 43; 4 Am. St. Rep. 189; *Philadelphia etc. R. R. Co. v. Fronk*, 67 Md. 339; 1 Am. St. Rep. 390, and note. The sounder doctrine would seem to be that compliance with such statutory regulations does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway: See monographic note to *Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 63. After the presence of a stranger upon a railway track at a place other than a public crossing becomes known to the engineer, a failure on the latter's part to observe all ordinary and reasonable care and diligence to avoid injury will render the company liable if injury results, unless it could have been avoided by the use of ordinary care on the part of the person hurt or killed: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145.

HUBER v. JOHNSON.

[68 MINNESOTA, 74.]

CONTRACTS AGAINST PUBLIC POLICY—CHAMPERTY.

A contract under which a person who is a stranger to both parties to a disputed claim for damages agrees with the claimant to undertake to hire an attorney, and prosecute a suit for the collection of the claim, entirely at his own cost and expense, for one-half of what he may collect on it, and the claimant agrees not to settle the claim without the written consent of the other party to the contract, and that if he does so settle he shall pay to such other party a fixed and arbitrary sum, regardless of the amount or value of the services rendered by the latter, is void, as against public policy and champertous.

L. W. Gammons, for the appellant.

W. R. Begg, for the respondent.

⁷⁶ MITCHELL, J. This appeal is from an order sustaining a demurrer to the complaint. Briefly stated, the allegations of the complaint were that, defendant having a claim against a railway company for damages for its failure to fence its road where it ran through his farm, he and plaintiff entered into an agreement by the terms of which the former employed the latter to adjust, compromise, settle, and collect this claim, and authorized plaintiff to employ an attorney to assist him in the matter, and to prosecute the claim by suit or otherwise in the name of the defendant, but at his, plaintiff's own cost; that plaintiff should have for his services "an amount equal to one-half of whatever sum may be collected upon said claim," but that plaintiff should not charge defendant anything for his services unless he succeeded in collecting the claim; that defendant should not settle the claim without plaintiff's consent in writing; that, if he did settle it without plaintiff's consent, he should pay the latter seventy-five dollars within ten days after making the settlement, "which said sum is hereby agreed upon as full ⁷⁷ compensation in such case for any services performed by second party hereunder." The contract further provided that whenever the plaintiff became satisfied that the claim was not good and valid for a sufficient sum to warrant his proceeding further, he might cancel and annul the agreement and all obligations thereunder. It also contained a general power of attorney from the defendant to the plaintiff to do and perform all and every act requisite or necessary in the premises as fully as defendant could do if personally present.

The complaint alleged that the plaintiff entered upon the performance of the contract, employed an attorney, and brought an

action to collect the claim, which was at issue and ready for trial when defendant, without the knowledge or consent of the plaintiff, settled the claim with the railway company for "a large sum of money"; that more than ten days had elapsed since the defendant so settled the claim; that plaintiff demanded of him the payment of the seventy-five dollars, the sum agreed in the contract to be paid in such event, but that defendant refused, and still refuses, to pay the same; that said sum of seventy-five dollars is the reasonable value for the services rendered by plaintiff for defendant in the matter.

The case has been argued and submitted on the assumption or concession by the respective counsel that plaintiff was a layman, and not an attorney; that he had no interest in the claim except what he acquired under this contract; and that he was in no way connected with the defendant by the ties of consanguinity, affinity, or otherwise. Neither have the counsel discussed the questions whether, if the contract was void, the plaintiff could recover the reasonable value of the services actually rendered, and, if so, whether the complaint is sufficient to entitle him to recover on that ground. On the contrary, both sides have treated the action as one on the express contract, and defendant's counsel himself says that the only question is as to the validity of that contract, therefore, that is the only question which we shall consider, and we shall do so upon the same basis of facts which counsel have assumed in their argument.

The contention of the defendant is, that the contract is void, as champertous, and as being against public policy. It is unnecessary to consider any disagreement among the common-law authorities as to the exact definition of champerty, for under any of them this agreement ⁷⁸ was clearly champertous at common law. Plaintiff's counsel claims that it would not have been so, because it does not provide that the plaintiff should have any part of or interest in the thing recovered, but merely that the amount of his compensation was to be a sum equal to one-half of the amount recovered. Notwithstanding some decisions apparently supporting this contention, we think that it is a distinction without a difference. In view of the abuses and evils against which the law against champerty was aimed, there is no substantial distinction between the two forms of words. If the law against champerty prevails in this state, and if it is to be enforced at all, the courts would not be justified in splitting hairs, and making a distinction based on a mere verbal quibble.

The common-law rules relating to champerty and maintenance

mainly rest on early English statutes, and it is contended that these statutes were never in force as a part of the common law of this country. In the majority of the states, it seems to be held that these rules, at least so far as adapted to our state of society, are still in force as a part of the common law, except so far as they have been changed by statute. In a number of states, however, it has been held that these early English statutes were never in force as a part of the common law, that they had their origin entirely in the state of society existing under the feudal system, and are wholly unsuited to our social and political system. So far as many of their provisions are concerned, this is doubtless true. But the essential principle upon which these statutes proceeded, and the evils and abuses at which they were aimed, are as old as human society, and will continue as long as human society exists.

The general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law. The principle upon which it proceeded was that contracts conducive of such results were against public policy. Blackstone speaks of men who are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels, as "the pests of civil society." This view was not peculiar to the common law. The Roman law animadverted with equal severity⁷⁹ on this class of men and their practices. This class of men in the form of "prowling assignees" and intermeddling speculators are unfortunately just as numerous, and their practices just as pernicious, as they ever were. It is no doubt true that the changes in the law making choses in action and rights of entry assignable, and giving parties the unrestricted right to agree with their attorneys as to the measure and mode of their compensation, have so emasculated the common-law rules against champerty and maintenance that it is difficult to determine how much, if anything, of the old English statutes on the subject remains in force. But that is a question which it is not necessary to consider. We do not think that any court, even of those which hold that these statutes are not in force, has ever gone so far as to hold that contracts may not so manifestly tend to stir up strife and contention and vexatious and speculative litigation, and prevent the amicable compromise of claims between citizens, as to be void on grounds of public policy.

The contract under consideration is, in our judgment, one of this class. Here a party, who is a stranger to both the defendant and the claim which is the subject of the contract, and has no object in intermeddling with the matter except a speculative one, undertakes to hire an attorney, and prosecute a suit for the collection of the claim, entirely at his own cost and expense, for the half of what he may collect on it. He does not even obligate himself to perform any service for the owner of the claim, for it is provided that whenever he becomes satisfied that he cannot collect enough on the claim to warrant his proceeding further, that is, whenever he thinks the speculation is not going to prove very profitable to him, he may cancel and annul the entire contract. But there is a still more objectionable provision in this contract, one upon which we mainly rest our decision. It is the one which binds the defendant not to settle the claim without the written consent of the plaintiff, and provides that, if he does settle without plaintiff's consent, he shall pay the plaintiff a fixed and arbitrary sum, without any regard to the amount or value of the services which the latter may have performed. The law favors the compromise of disputes without litigation, and it is difficult to conceive of any stipulation more against public policy than one which prohibits a party from settling his own dispute, or at least prevents it except by his subjecting ^{so} himself to the payment of an arbitrary penalty for doing so; and this is the stipulation which plaintiff is seeking to enforce in this action. We think it is void as against public policy.

Order affirmed.

CHAMPERTY—WHAT CONTRACTS ARE CHAMPERTOUS.—

A fair bona fide agreement by a layman to supply funds to carry on pending litigation in consideration of having a share in the property in dispute if recovered, is not per se void, either on the ground of champerty or of public policy; but if such contract is made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, it is within the doctrine of champerty, and should not be enforced: *Brown v. Bigne*, 21 Or. 260; 28 Am. St. Rep. 752, and note; *Roberts v. Yancey*, 94 Ky. 243; 42 Am. St. Rep. 357, and note. See notes to *Manning v. Sprague*, 12 Am. St. Rep. 512, and *Thalheimer v. Brinckerhoff*, 15 Am. Dec. 316-322.

POWERS DRY GOODS COMPANY v. HARLIN.

[68 MINNESOTA, 193.]

DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS.—A creditor not guilty of fraud may ignore and repudiate a general composition settlement with a debtor, when another creditor, in conjunction with the debtor, has secretly obtained an undue advantage and a fraudulent preference in the composition, and the first-named creditor may recover of the debtor on his original claim.

DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS—RELEASE OF SURETIES.—A security given by a surety for a debtor in a general composition settlement with creditors is voidable on the ground of fraud, if there is with the knowledge or consent of the creditor, such a misrepresentation to, or concealment from the surety, of the transaction between the creditor and his debtor that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased.

P. J. McLaughlin and G. F. Edwards, for the appellant.

Shaw, Cray, Lancaster and Parker, and C. E. Bond, for the respondents.

¹⁹⁵ COLLINS, J. After defendants Harlin Brothers had made an assignment for the benefit of their creditors, among whom was plaintiff, a corporation, a composition agreement was made and entered into between the debtors and each of their creditors upon a basis of thirty-three and one-third per cent of the entire indebtedness. In accordance with this agreement, plaintiff accepted and received the debtors' promissory notes, with sureties, as hereinafter stated, while all other creditors received their money immediately. Defendant Sederberg was one of the creditors signing the composition agreement, and, after it had been signed by all parties thereto, he became a surety upon one of these notes. At maturity this note was taken up by the execution and delivery of another note for the same sum executed and delivered by Harlin Brothers with Sederberg as surety. Defendant Hanson also became a surety upon one of the original notes, and so did defendant Nelson. When these three notes matured, separate actions were brought, and each of these sureties answered.

Upon trial by the court without a jury, the court found that, before the composition agreement was signed by any of the creditors, plaintiff, as a condition to its signing the same, and without the knowledge of any of the other creditors of Harlin Brothers, and without the knowledge of any of the parties who became sureties, demanded that Harlin Brothers give their written promise to pay plaintiff a larger ¹⁹⁶ percentage than was to be paid

to the other creditors, and that pursuant to this demand, and before plaintiff signed the composition agreement, and as a condition to said signing, Harlin Brothers acceded to the demand, and thereupon executed and delivered to plaintiff three promissory notes for the balance due, sixty-six and two-thirds per cent of plaintiff's entire claim, taking back from the plaintiff its written stipulation to discharge and surrender the note last mentioned upon payment of twenty-five per cent of the same.

The court also found that neither of these sureties had any knowledge of this secret agreement until long after the note on which Sederberg became surety had been renewed, as before stated; that each of the sureties signed at the request of Harlin Brothers, and upon their representations that they had made a valid and complete composition with all of their creditors on the basis of thirty-three and one-third per cent of their total indebtedness; and, further, that neither of the sureties would have become such, had they known to the contrary. Later, Harlin Brothers again being insolvent, made another assignment for the benefit of their creditors. The question in this case is, Must the secret agreement found by the trial court to have been made between plaintiff creditor and defendant debtors, and to have been executed as a condition for the plaintiff's signature to the composition agreement, by the delivery of the debtors' note for the balance of plaintiff's claim over and above the amount stipulated for in the composition agreement, be held to have discharged the sureties upon the notes given in accordance with the terms of the agreement last mentioned? The answer to this question turns, we think, upon whether or not the composition agreement itself was rendered invalid by the execution of the secret arrangement whereby the plaintiff secured the debtors' note before referred to.

While there are some decisions to the contrary, the weight of authority is clear that a creditor not guilty of the fraud may ignore and repudiate a general composition when another creditor has secretly obtained an undue advantage and a fraudulent preference in the composition, and may recover on the original claim. A large number of cases might be cited in support of this statement of the law, but prominent among them are *Doughty v. Savage*, 28 Conn. 146; *Huntington v. Clark*, 39 Conn. 540; *Cobb v. Tirrell*, 137 Mass. 143; *Saul* ¹⁹⁷ *v. Buck*, 72 Ga. 254; *O'Brien v. Greenebaum*, 92 Cal. 104; *Zell Guano Co. v. Emry*, 113 N. C. 85; *Bank of Commerce v. Hoeber*, 88 Mo. 37; 57 Am. Rep. 359. See, also, *Musgat v. Wybro*, 33 Wis. 516; *Hefter v. Cahn*, 73 Ill.

296; and, under the head "Constructive Fraud," 1 Story's Equity Jurisprudence, sec. 378. The doctrine and the reasons therefor are well stated in *Huntington v. Clark*, 39 Conn. 540, where it is said, at page 553: "The rules and principles which govern contracts of compromise between an insolvent debtor and his creditors, whether in the form of 'composition deeds,' as they are usually styled, or otherwise, are very thoroughly established and very generally understood. The utmost good faith must be observed by all parties; any fraud taints and makes void the agreement, however technical or solemn may have been its form or the mode of its execution. This, indeed, may be said of all contracts, but especially of those of this character. The nature of these transactions, and the situation of the parties, afford at once temptation and opportunity for committing fraud. The debtor in his statement is tempted to swell the amount of his liabilities, or lessen the amount of his assets, or both, in order to make a settlement at the lowest figure; and the creditors, though purporting to act together, are found, not rarely, acting individually, and stipulating with the debtor for the payment of their claims, in whole or in part, over and above the amount of their dividend. It scarcely need be said that any misrepresentation or concealment on the part of the insolvent renders his release void; any contract by one creditor for a preference over his fellow creditors is not only void, but, as determined by the later authorities, such contract in effect works a forfeiture of the claim to an otherwise honest dividend. The parties necessarily repose special trust and confidence in each other, and to repress the temptation to abuse or violate that trust and confidence the rule requiring the observance of entire good faith, the 'uberrima fides' of the civilians should be rigidly enforced."

Nor do any of these authorities discriminate between cases where the preference is secured through an agreement fully executed by payment, and where no payment is made and the secret agreement itself may be adjudged void and nonenforceable. The rule thus laid down is one which commends itself to us. Its adoption will promote fair dealing and strict integrity of action upon the part of creditors when dealing with each other and with unfortunate debtors who are seeking to make a composition settlement upon an honest basis. Such a rule tends to prevent a creditor from decoying others into a composition
198 by fraudulent practices and pretended releases upon what seems to be entire equality of payment, and it will also relieve the debtor from being driven into permitting an undue advan-

tage to be taken of him by reason of his necessities. The doctrine contended for by counsel for plaintiff, that the secret agreement only is vitiated by the fraud, although supported by some authorities, does not commend itself to us. If it should be indorsed, a creditor could secure an undue advantage with impunity, for he would take no risk. If the secret agreement was repudiated by the debtor as tainted with fraud, the creditor would still have the full benefit of the composition agreement, and would simply fail to obtain the additional percentage. We cannot encourage and promote bad business morals by the adoption of such a rule of law.

We have stated that authorities may be found to support plaintiff's contention. Counsel have referred to three cases as sustaining their claim that the composition agreement must be upheld notwithstanding a fraud has been perpetrated by the connivance of the debtor himself with one or more of his creditors. One of these cases, *Page v. Carter*, 16 N. H. 254, 41 Am. Dec. 726, decides that a debtor does not forfeit the benefits of a composition with his creditors by secretly paying or promising to pay one of such creditors a sum of money in order to secure the latter's concurrence to the composition. No authorities are cited in support of the position, and those opposed to it are silently ignored. The reasoning seems to be that, as the rule is that the secret agreement can be avoided, to hold "that the debtor should be charged with complicity in a fraudulent transaction designed to defeat the measures which have been instituted for his relief would be to ingraft upon that rule of law an alien branch that would conflict with its beneficial purposes."

If by this it is intended to lay down the proposition that, as the secret agreement is fraudulent and may be avoided, the balance of the transaction must stand because it is of benefit to the debtor, we think the reasoning extremely faulty. We are not advised of any rule of law or equity which permits any contract tainted with fraud to stand, in whole or in part, because a party to the fraud may be benefited by it. Another case is *Bartlett v. Blaine*, 83 Ill. 25; 25 Am. Rep. 346. There ¹⁹⁹ the facts were that a debtor induced a creditor to sign a composition agreement at fifty per cent by affirmatively representing to him, in writing, that no other person had or should receive more than fifty per cent directly or indirectly. As a matter of fact, the debtor had already given his note for five hundred dollars to induce another creditor to sign the agreement, which note, upon suit thereon, had been adjudged void. It was held that the fraud

was insufficient to avoid the composition contract in an action brought by the creditor to recover the balance of his original claim.

The court appears to have treated the cause as an action for fraudulent representations, in which it was incumbent upon the plaintiff to show, not only that the representations were made and were false and fraudulent, but, in addition, that he was injured thereby. It is there argued that the existence of the five hundred dollar note in no way prevented the creditor plaintiff from getting the fifty per cent stipulated for, and, in reply to the claim that by means of active fraud he had been induced to sign the composition, that no attempt had been made to prove that he was any worse off than if he had not signed, particular stress being laid on the fact that the debtor was a bankrupt when the agreement was entered into, with over sixty thousand dollars liabilities and about thirty-five thousand dollars of assets. No proof was offered, said the court, to show that the creditor's demand was of any greater value than the fifty per cent received therefor. By the reasoning of this case the right to disregard the composition agreement is made to depend upon a future determination as to whether or not the creditor imposed upon and deceived has actually suffered a loss. If the debtor could have paid more than he agreed to, and this is shown upon the trial, with proof of the secret agreement, the composition may be avoided; otherwise not.

We are not satisfied with this line of reasoning. And the court, when deciding the case, seems to have overlooked what was said in *Hefter v. Cahn*, 73 Ill. 296, in which it had been stated, at page 301: "If, then a secret agreement made with one of the creditors is void, and contrary to public policy, does justice or honesty require that a composition agreement should be binding upon a creditor who is induced to become a party there-to under the belief that all the creditors are to be paid pro rata, when, in fact, one of them has a secret contract from the debtor by which he is to be paid in full, or ²⁰⁰ have an undue advantage over the others? We cannot give our sanction to a doctrine so unjust as this. When a composition agreement is executed, the debtor professes and holds out to deal with all the creditors who enter into it on terms of perfect equality, when, if at the same time he has a secret agreement with one of the creditors, which gives him an undue advantage, this is a fraud upon the others, and a contract thus obtained cannot be said to be fairly made, but is tainted with fraud, and a fraudulent contract will

not support an action, neither can it be made the foundation for a defense."

We now come to the case of *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 40 Am. St. Rep. 607, which counsel for plaintiff rely upon great confidence. Two of the learned justices announced a dissent, without elaboration. The facts were that Blake & Co. entered into composition agreement with their creditors by the terms of which the latter were to receive forty per cent in full of their claims, in four notes to each creditor—two payable in six and twelve months, and two in eighteen and twenty-four months, the latter two to be indorsed by Mrs. Blake. The plaintiff bank induced Mrs. Blake to indorse all of the notes made payable to it, thus securing additional security, without the knowledge of the other creditors. The action in question was against Blake & Co. and Mrs. Blake, as indorser upon the third note of the series—a note which was to be, and had been, indorsed by Mrs. Blake under the terms of the composition agreement. There was nothing in the case indicating what had become of the six and twelve month notes which she did indorse outside of the terms of the composition. While it is not directly stated that Mrs. Blake knew the terms and conditions of the composition agreement, and that she was to indorse but two of the notes given to each creditor, we think that by implication it clearly appears in the opinion that she knew all about it, and, if a fraud was perpetrated upon other creditors by plaintiff bank and the debtors, she had knowledge, and was a party thereto. It was held that a recovery could be had on the indorsement. The views of the court are found in the following excerpt from the opinion, at page 414: "Here the agreement with other creditors for a composition was lawful and valid (unless they should elect to rescind it upon the discovery of the secret agreement, an element not present); but the agreement for, and the giving of, additional security was unlawful and void. Is there any reason why the bad may not be rejected and ²⁰¹ the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiff's original demand, or that it shall fall and leave the plaintiff at liberty to recover the original debt, I am for upholding it and I fail to see why the legal part of the transactions had with it cannot be severed from the illegal part. We should be careful, in our desire, to punish the harsh and unscrupulous creditor, who presses his debtor and bargains for an advantage over other creditors, by deprivation of legal rights and remedies,

that we did not go too far and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory, they may not so elect, and may rely that the creditor, secretly seeking to obtain some promise of advantage over them will be prevented from enforcing it and from gaining anything by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation, which, from its inception, was unlawful, and which the law annuls."

We cannot reconcile much that is found in this extract with the opening paragraph, where it is conceded that the composition could be rescinded by other creditors upon a discovery of the secret agreement, "an element not present," remarks the court, except upon the theory that Mrs. Blake was a party to the fraud, and hence could not avail herself of the ordinary defense open to an indorser, surety, or guarantor who comes into court with clean hands. We are of the opinion that the case last referred to is not authority upon the question here, even if we concede that a correct conclusion was reached upon the facts there present: And see *Solinger v. Earle*, 82 N. Y. 393; *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886.

As hereinbefore stated, we are convinced that the fraud tainted the entire transaction, to the extent that the composition itself could have been repudiated by the innocent creditor. We are unable to distinguish between the composition and the secret agreement which was the foundation upon which it rested. We cannot concur in any line of reasoning which separates and severs the fraudulent whole ²⁰² into two parts, one good and to be upheld, the other bad and to be denounced. If fraud vitiates all contracts into which it enters, it has no stopping place in a transaction of this kind, no halfway house beyond which it has no footing. It permeates the composition agreement through and through. With these views of the effect of the secret agreement upon the composition, we are brought to a consideration of the rights of these sureties on the composition

notes, and these rights we regard as well settled in this state and elsewhere. The duty of a creditor to a surety is thus stated in *Doughty v. Savage*, 28 Conn. 146, at page 155: "It is a clear and well-settled principle that a security given by a surety is voidable on the ground of fraud, if there is, with the knowledge or assent of the creditor, such a misrepresentation to, or concealment from the surety, of the transaction between the creditor and his debtor, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased."

A number of cases are cited in support of this doctrine. It has also been approved in this court recently, in *Trader's Ins. Co. v. Herber*, 67 Minn. 106. The remaining inquiry is, Would knowledge of the existence of the secret agreement have been calculated to materially influence the sureties when determining whether they would enter into their contracts of suretyship on the composition notes? The object of that agreement was to release the debtors from a portion of their indebtedness, and the sureties entered into their contract for this purpose, induced so to do by the presentations and belief that the debtors were to be freed and released from any further liability. In this they were deceived, and through the concealment of the plaintiff, payee of the notes, the object was not attained. By reason of the fraud it was within the power of the innocent creditors to ignore the composition, and recover the balance due upon their claims. The ability of the debtors to meet their notes or to indemnify the sureties was hazarded and impaired at once by the contingency. That the extent of the sureties' liability and the risk they had assumed were materially increased is obvious. The concealment was a fraud upon them, and exonerated them from their obligations.

Order affirmed.

203 CANTY, J. While agreeing with the majority in the result arrived at, I cannot concur in the foregoing opinion. For the purposes of rescission, that opinion treats the composition agreement as a contract solely between the two guilty parties, the debtor and the creditor who entered into the secret agreement. As to such creditor, it allows the debtor to repudiate the contract and rescind on account of his own fraud, without regard to his contract obligations to other creditors who are also parties to the composition agreement, and who have a right

to insist that the debtor shall not repudiate his contract, but shall carry it out. Of course, if a composition agreement was merely a series of independent agreements, each one solely between the debtor and a single creditor, the debtor could, for fraud, repudiate or rescind the contract between himself and the particular creditor, without regard to his contracts with the other creditors. But it is elementary that a composition agreement cannot be supported at all on the theory that it is such a contract. On the contrary, the only consideration for the composition agreement is the collateral consideration furnished by the mutual promises of the creditors each to the others. For this very reason the secret agreement between the debtor and the one creditor is a fraud on the other creditors. And yet it is held that the guilty debtor may, with the assistance of the court, violate his contract with these innocent creditors because of his fraud upon them when entering into that contract.

In this case the debtor agreed with his innocent creditors that he would never pay plaintiff but thirty-three and one-third per cent of its claim, and it agreed with these creditors that it should never receive any more. There are various good and sufficient motives which these innocent creditors might have had for entering into this contract. Each of them may have regarded it as a case where, at the end of a scramble among creditors, he would get less than he would get under the composition agreement, or he might have desired to protect the goodwill of the debtor's business for the purpose of future trade with him. But what such creditor's motive was is immaterial. He is entitled to have his contract carried out. His contract is that the debtor shall pay the plaintiff thirty-three and one-third per cent of its debt, and no more. But the debtor says: "Because of my own fraud, I will pay nothing under the contract. I will rescind the contract, as between me and the plaintiff, and then the plaintiff will be free to recover one hundred per cent ²⁰⁴ of its claim from me, notwithstanding its solemn agreement with these other creditors that it should never receive but thirty-three and one-third per cent." Surely, if this contract is rescinded, the plaintiff must be placed in statu quo, and then it will be in position to recover the whole of its original claim. These are the absurd results to which the position of the majority leads.

True, that position is supported by considerable authority, but it is nevertheless erroneous. In those cases the courts overlook three very plain propositions: 1. As a general rule, where

a contract is entered into by and between three or more different parties, it cannot be rescinded for fraud unless each and all of the parties can be placed in statu quo; 2. As a general rule, any party not guilty of fraud may prevent a rescission, and insist that the contract shall stand and be carried out, at least when the consideration is mutual, or the contract is entire and inseparable as between him and any other party as to whom it is proposed to rescind the same: *Getty v. Devlin*, 54 N. Y. 403, 414; 5 *Wait's Actions and Defenses*, 522; 2 *Parsons on Contracts*, 678; 3. No exception to either of these general rules should be made in favor of any party who is himself guilty of the very fraud for which it is proposed to rescind the contract, and the contract should not, without the consent of all the innocent parties to it, be rescinded merely for the benefit of such guilty party. But even where it is not possible to place all parties completely in statu quo, or where some of the innocent creditors refuse to join in a rescission, an action for rescission may, in a proper case, be maintained in equity if proper provisions can be made for protecting the rights of all parties: See 21 *Am. & Eng. Ency. of Law*, 89. However, in such a case the action must be brought by a party who comes into court with clean hands.

Applying these principles to the case at bar, I am of the opinion that only the secret agreement can be avoided by the debtor who participated in the fraud, and the composition agreement must stand until it is rescinded by the innocent creditors. But this does not dispose of the case as to defendant Sederberg, who is a mere surety. While the composition agreement provides that the plaintiff shall have just such security as has been given him for thirty-three and one-third per cent, still, if the defendant surety is compelled to pay, he will be subrogated to the rights of the plaintiff, and can proceed to collect what he has paid from the ²⁰⁵ principal debtor, and therefore it can make no difference to the other creditors whether the principal debtor is compelled to pay the plaintiff or to pay the surety.

Then the stipulation for such security in the composition agreement was made solely for the benefit of the plaintiff, and not for the benefit of the other creditors at all; and they have no right to insist that such stipulation be carried out as to plaintiff, and the defendant surety compelled to perform his contract. As to such surety, the contract can be treated as one solely between him, the plaintiff, and the principal debtor. The se-

cret agreement was a fraud upon such surety. His contract was not what he supposed it was. He became surety pursuant to a fraudulent and voidable agreement, not a valid one. After he had paid the thirty-three and one-third per cent for which he had become surety, and before he had reimbursed himself from the principal debtor, the other creditors might, by bill in equity, rescind the composition agreement, and be thereby restored to the full amount of their original claims. This might prejudice and embarrass him. His liability is *strictissimi juris*.

For these reasons I am of the opinion that there was such misrepresentation to and concealment from the surety that he is entitled to avoid his obligation.

DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS. If a composition agreement is entered into between a debtor and his creditors, and one of them makes with him some secret agreement to secure an advantage over the others, this latter agreement is void, and must be disregarded, but its existence does not avoid the composition agreement so as to disentitle such creditor to recover what is due thereunder: *Hanover Nat. Bank. v. Blake*, 142 N. Y. 404; 40 Am. St. Rep. 607, and note; *Kullman v. Greenebaum*, 92 Cal. 403; 27 Am. St. Rep. 150, and note. A composition deed is in spirit an agreement between the creditors themselves, as well as between them and their debtor: *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886; and every composition tainted with preference is void: See monographic note to *Bank of Commerce v. Hoeber*, 57 Am. Rep. 363.

DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS AS AVOIDING SECURITY.—A security given in pursuance of a contract whereby any of the creditors who have entered into an agreement of composition with their debtor has, unknown to the others, obtained any benefit beyond the others, is absolutely void even against the debtor who may have been given the security: *O'Shea v. Collier etc. Co.*, 42 Mo. 397; 97 Am. Dec. 332; monographic note to *Bank of Commerce v. Hoeber*, 57 Am. Rep. 369. If, on obtaining the signature of persons as sureties, guarantors, or indorsers, there is fraudulent concealment of any fact or circumstance materially affecting the liability of such surety, guarantor, or indorser, and operating to his prejudice, he is released from liability as against any creditor having knowledge of, or reasonably chargeable with, notice of such concealed fact or circumstance: *Jungk v. Holbrook*, 15 Utah, 198; 62 Am. St. Rep. 921, and note.

MORSE v. WELLCOME.

[68 MINNESOTA, 210.]

USURY—EXTENSION OF TIME TO PAY NOTE.—A note not originally usurious is not made so by a subsequent agreement to extend the time of payment, although such agreement is in consideration of a payment of, or a promise to pay, usurious interest.

Action to set aside a mortgage agreement, foreclosure sale, and certificate of sale as usurious and void. Plaintiffs executed to defendant a note for five hundred and twenty-nine dollars on May 11, 1894, due September 11, 1894, with interest at seven per cent per annum secured by mortgage on certain real estate. At maturity of the note the parties entered into a written agreement by which the mortgage and note were extended for payment for one year upon payment of interest on such note to October 11, 1894, "also three per cent on the face value of such note from May 11, 1894, till September 11, 1895," and payment of six dollars attorney's fee to a person named. A demurrer to the complaint was sustained and plaintiffs appealed.

W. L. Comstock and G. R. Geddes, for the appellants.

L. Gray, for the respondent.

212 COLLINS, J. It was not alleged in the complaint herein that the original note or mortgage were in any degree tainted with usury; and, if not usurious, the original transaction could not be made so by the subsequent agreement to extend the time of payment, although such agreement was in consideration of a payment of, or a promise to pay, usurious interest: Avery v. Creigh, 35 Minn. 456. In so far as the agreement for an extension was a contract to pay a compensation for the past use of money, it was not a contract to pay interest in any legal or proper sense, or within the meaning of the statute regulating the rate of interest: Daniels v. Wilson, 21 Minn. 530. Whether the contract, in so far as it provided for compensation for the future use of the amount of the note, was or was not usurious, we are not required to decide, for, admitting that it was, facts sufficient to constitute a cause of action were not stated in the complaint.

Order affirmed.

USURY—WHEN INFECTS EXTENSION OF TIME ON NOTE.—When a borrower upon a loan not originally usurious, in order to obtain an extension of time thereon, pays anything in addition to the lawful rate of interest, or enters into any new agreement stipulating for a higher rate than he is allowed by law on the original loan, the transaction is usurious, yet this does not affect the original

transaction, and therefore it may be disregarded and a suit maintained upon the note or obligation first taken: See monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 187; *Gates v. Hackenthal*, 57 Ill. 534; 11 Am. Rep. 45. Compare *Erwin v. Lowry*, 2 La. Ann. 314; 46 Am. Dec. 545; *Price v. Lyons Bank*, 33 N. Y. 55; 88 Am. Dec. 368; monographic note to *Davis v. Garr*, 55 Am. Dec. 393.

ROSSE v. ST. PAUL AND DULUTH RAILWAY CO.

[68 MINNESOTA, 216.]

RAILROADS—FENCE LAW—INJURY TO CHILD.—A statute requiring a railway company to fence its road and to maintain such fence, and providing that "it shall hereafter be liable for all damages sustained by any person in consequence of its failure or neglect to fence," imposes an absolute duty on the company to fence, and is not a mere fence law for animals, but is also a police regulation designed for the benefit of the public, and under it, the company is liable for injury inflicted by its train upon a young child, who, being non sui juris, strays upon the track, and is injured in consequence of the failure of the company to fence its road.

L. Arctander and J. W. Arctander, for the appellant.

Hadley & Armstrong, for the respondent.

217 MITCHELL, J. This action was brought to recover damages for personal injuries to the plaintiff, a child alleged to be non sui juris, who had strayed upon the track of defendant's road, and was there injured by a passing train. The only negligence charged against the defendant was its failure to fence its road, as required by statute, at the place where the plaintiff strayed upon the track, and where he was injured, it being alleged that if the railway had been fenced at that point plaintiff would have been prevented from going upon it. A demurrer to the complaint was sustained upon the authority of *Fitzgerald v. St. Paul etc. Ry. Co.*, 29 Minn. 336, 43 Am. Rep. 212, in which it was held that the statute requiring railroad companies to fence their roads **218** was inapplicable to the case of infants, although non sui juris; that it was only designed to prevent animals from coming upon the track, with the consequent danger to the animals themselves and the passengers and employes upon railroad trains.

The writer, who is the only member of this court who was on the bench when the *Fitzgerald* case was decided, assumes his full share of responsibility for that decision, but subsequent reflection has convinced him that the court placed too narrow a construction upon the statute; that the views expressed in the dissent of the late chief justice Gilfillan were correct; and that

the decision of the court should be overruled. In this view all the present members of the court concur. In our opinion, the court failed to give due weight to the very broad language of the amendment of 1877 (Gen. Stats. 1894, sec. 2695), which was a complete substitute for section 4 of the prior act. It provides that if a railroad company fails or neglects to fence its road, and to maintain such fences, it "shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect."

As was said by the late chief justice, the duty created by the statute is absolute, and, as we have decided, it is not a mere fence law, but a police regulation designed for the benefit of the public. It may be conceded that, in an action for a neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed, but that he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security. But the question for whose benefit or protection a statutory duty was imposed depends on the purview of the legislature in the particular statute, and the language which they have there employed. From the fact that the dangers from leaving a railroad unfenced most frequently arise from domestic animals straying on the track, and most of the decided cases involved that state of facts, it is very natural for us to become impressed with the idea that such statutes were designed merely to guard against the dangers resulting from such animals getting upon the railroad track.

But in view of the very general and sweeping language of the statute, in connection with the fact that it is confessedly a police regulation for the protection of the public, it is not for courts to speculate ²¹⁹ as to what was the precise intention of the legislature when they required the road to be fenced, or to assume that the prevention of animals straying on the track is all that is within the purview of the statute. If, as is conceded, it was designed to prevent dumb beasts from straying upon the track, how can we assume that it was not also designed to prevent infants, who are equally irresponsible, from straying there? As has been said, in one case a fence may be a very formidable obstruction to a child's going upon a railroad company's right of way, it may prevent his going there entirely; and, if it would, we do not think we have any right to say that his protection was not within the purview of the statute. In view of the kind of fence which the statute permits to be built,

it may be in most cases a question whether the existence of such a fence would have prevented the child from straying upon the track, and hence whether the failure of the railway company to build it was the proximate cause of the injury. But that is a matter of proof on the trial. As no two statutes on the subject are altogether alike, cases from other jurisdictions are not exactly in point, but as supporting, more or less, the views we have expressed, see *Schmidt v. Milwaukee etc. R. R. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 405; *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262; *Williams v. Great Western etc. Ry. Co.*, L. R. 9 Ex. 157.

It is suggested that as the decision in the *Fitzgerald* case has stood unchallenged for fifteen years, during which the legislature has not, by amending the statute, expressed any dissatisfaction with the construction which this court had placed upon it, therefore it ought not now to be overruled, even although erroneous. The decision is not a rule of property. Neither can railway companies claim to have acquired any right, either legal or moral, under it, for it did not repeal the statute, nor release them from the duty of fencing their roads. The fact that the legislature has not amended the statute is not entitled to much weight. Cases where young infants are injured by straying upon an unfenced railroad track are comparatively rare, and, until such a case does arise, no one is likely to look into the matter or call the attention of the legislature to the state of the law on the subject.

Order reversed.

RAILROADS—STATUTORY DUTY TO FENCE—INJURY TO CHILD.—In the absence of statutory provision, there is no obligation resting upon railroads to fence in their property: Note to *Witte v. Stifel*, 47 Am. St. Rep. 674. Such statutes are construed as police regulations for the safety of the public (*Indiana etc. R. R. Co. v. Guard*, 24 Ind. 222; 87 Am. Dec. 327), and of passengers, rather than for the protection of the owners of animals: *New Albany etc. R. R. Co. v. Tilton*, 12 Ind. 3; 74 Am. Dec. 195; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100. A similar statute has been also construed as for the protection of railroad employés: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429. The neglect of a railway company to fence its road may be considered by the jury in an action for an injury to a child straying upon the track: *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 405. Though this is expressly contradicted in *Fitzgerald v. St. Paul etc. Ry. Co.*, 29 Minn. 336; 43 Am. Rep. 212. See *Schmidt v. Milwaukee etc. Ry. Co.*, 23 Wis. 186; 99 Am. Dec. 158, which imposes direct liability upon a railroad company where a child strays upon its track by reason of the failure of the company to fence as required by law, and is injured.

LANCASHIRE INSURANCE COMPANY v. CALLAHAN.

[68 MINNESOTA, 277.]

SURETYSHIP—ADMISSIONS OF PRINCIPAL AS EVIDENCE.—Admissions made by a principal in the course of the performance of the business for which his surety is bound are admissible against the latter as part of the *res gestae*.

SURETYSHIP—NOTICE OF DISHONESTY.—If there is a continuing suretyship for the faithful discharge of his duties by a servant, and the master discovers that the servant has been guilty of dishonesty in the course of the service, and thereafter continues him in such service, without notice to and the assent of the surety, express or implied, the latter is not liable for any loss arising from the dishonesty of the servant during his subsequent service, but this rule has no application to mere breaches of duty or contract obligations on the part of the servant not involving dishonesty on his part, or fraud or concealment on the part of the master.

SURETYSHIP—NOTICE OF DISHONESTY.—In case of a continuing suretyship for the faithful discharge of his duties by a servant or agent, notice by letter from the principal to such servant or agent that the latter is in arrears in his accounts and derelict in not making his reports, but not suggesting moral turpitude, want of integrity, or dishonesty on the part of the servant or agent, is not sufficient to discharge the surety from liability for a subsequently discovered defalcation by such servant, who was continued in the service after such notice had been given, without the assent of the surety.

H. F. Greene, for the appellant.

Doolittle & Shoemaker, and Brooks & Hendrix, for the respondent.

²⁷⁸ **START, C. J.** This is an action upon a bond to the plaintiff given by the defendant's testator as surety for William A. Teall. Trial by the court without a jury, and judgment for the plaintiff, from which the defendant appeals.

Teall was the agent of the plaintiff at Eau Claire, Wisconsin, and the bond was conditioned for the faithful performance of his duties as such agent, which were to keep correct accounts of the business of his agency, to make regular reports of it, to pay over moneys collected by him, and to deliver up all money and property of the plaintiff ²⁷⁹ in his possession at the termination of his agency. The complaint alleged, and the trial court found as a fact, that Teall, as such agent, between February 2 and August 10, 1893, collected and received the sum of \$822.30 belonging to the plaintiff, of which sum he failed to pay to it \$510.59, and has not paid the same, although duly demanded on August 23, 1893. The answer denied these allegations of the complaint, and alleged as a second defense that the plaintiff knew on April 26th that Teall was a defaulter, and had mis-

appropriated its money in the sum of \$164.50, but did not notify the surety of such fact, and continued Teall in its employment with knowledge of such fact; that more than \$300 of the money which he failed to pay over was received by him after the plaintiff knew of his previous defalcation. The defendant's contention here is (a) that the finding of the trial court as to the amount of Teall's shortage is not sustained by any competent evidence; (b) that the undisputed evidence establishes the second defense alleged in the answer.

1. The evidence to establish the amount of money belonging to the plaintiff received and not paid over by Teall as such agent consisted of the admissions of Teall to a special agent of the plaintiff in connection with an examination of Teall's books and accounts relating to his business with the plaintiff as its agent, showing policies issued, premiums collected, and the amount due to the plaintiff, and oral evidence to the effect that the books, accounts, and papers connected with and kept by Teall in the course of the business of his agency showed that he was, on August 23, 1893, indebted to the plaintiff in the sum of over \$500. There was no exception to the admission of any of this evidence. It was objected to, and "received subject to objection." This was insufficient to enable the defendant to raise any question as to competency or admissibility of the evidence. The defendant should have then and there excepted to the ruling of the trial court in receiving the evidence subject to objection, or reserved an exception to such ruling as the trial court might make on the objection: *Kumler v. Ferguson*, 22 Minn. 117.

The secondary evidence, then, as to what the books and reports showed, must be given the same probative force as the books themselves. The mere admission of Teall, disconnected with everything else, although received without objection, would not have any tendency, ²⁸⁰ as against the defendant, to prove the state of the accounts between him and the plaintiff. But this examination of the books and accounts of Teall's agency was while he was still the agent of the plaintiff, and his admissions accompanied such examination, and they and the books, accounts, and reports made in the performance of the business of his agency were admissible against the surety as a part of the *res gestae*: 1 *Greenleaf on Evidence*, sec. 187; 2 *Brandt on Suretyship and Guaranty*, sec. 627; *Wood on Practice Evidence*, sec. 176.

The evidence was sufficient to support the findings of the trial

court. The plaintiff offered as general evidence a judgment obtained by it against Teall for his shortage, which was excluded on the defendant's objection. It was then offered for the purpose of showing that the amount which Teall admitted to be due had not been paid, and it was received over the defendant's objection and exception. Conceding without so deciding, that the judgment as against the surety was evidence only of its recovery, it is clear that its reception for the specific purpose for which it was received was not reversible error. There was no issue as to the payment of the plaintiff's demand against Teall; no claim that it had been paid was pleaded or made by the defendant. The defendant could not have been injured by the reception of incompetent evidence to prove a conceded fact.

2. This brings us to the second defense made by the defendant. The law as to this defense is that, where there is a continuing suretyship for the faithful discharge of his duties by a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and thereafter continues him in such service, without notice to and the assent of the surety, express or implied, to such course, the latter is not liable for any loss arising from the dishonesty of the servant during his subsequent service. But this rule has no application to cases of mere breaches of duty or contract obligations on the part of the servant not involving dishonesty on his part, or fraud or concealment on the part of the master: 2 Brandt on Suretyship and Guaranty, sec. 423; *Home Machine Co. v. Farrington*, 82 N. Y. 121; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196; *Charlotte etc. R. R. Co. v. Gow*, 59 Ga. 685; 27 Am. Rep. 403; *Richmond etc. Ry. Co. v. Kasey*, 30 Gratt. 218; *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210.

The defendant moved the trial court to amend its findings of fact, and make certain findings as to the defense that the surety was discharged. ²⁸¹ The motion was denied on the ground that the proposed findings were immaterial. This ruling is assigned as error, and the claim made that the court should have found as requested. We have, then, the question: Was the evidence sufficient to justify the trial court in finding the facts which would support the conclusion of law that the surety had been discharged? We answer it in the negative. The defendant concedes that the only evidence to support his proposed findings is a letter from the plaintiff's assistant manager to Teall, dated April 26, 1893, which is in these words: "Herewith copy

of your account current ending with February, which shows a balance due of \$164.50. I have written you previously regarding this balance, and, as we find it necessary to close our February account, I have this day made draft on you, which I trust will be promptly honored. It seems to be a hard matter for you to settle your balances. What appears to be the difficulty? Is it on account of slow collections, or that you have your surplus funds invested so that you are not in position to make advances, and extend the necessary courtesy to customers? We do appreciate prompt remittances. It seems that you never furnish us with monthly accounts. These are essential, and won't you please do so in future? We have to make up your account as best we can from your dailies and cancellations and it is a great inconvenience."

This letter falls short of bringing this case within the rule we have stated to the effect that it was necessary for the defendant, in order to establish the defense, to show that Teall had actually received money belonging to the plaintiff, and that it had notice thereof, and that his failure to pay it involved dishonesty on his part. It was not sufficient that the plaintiff only knew that Teall was in arrears in his accounts, or derelict in not making his reports. Now, this letter does not suggest moral turpitude or want of integrity on the part of Teall, but rather a want of diligence and promptness in the discharge of his duties. It negatives any knowledge on the part of the plaintiff that he was dishonest in its service, or was guilty of embezzling its money. It impliedly asserts that the money for premiums on policies issued during February was past due as between plaintiff and Teall, and that payment of the balance had been previously requested. It also assumes that the money had not in fact been paid to him, but that he had, in accordance with the usual custom, extended credit to parties ²⁸² to whom he had issued policies, and that the reason he was in arrears was either that collections were slow, or that his own funds were so invested that he could not make advances for his customers whom he had trusted for their premiums. Other than this letter, there is no evidence that the plaintiff knew that Teall had actually collected its money prior to August 23, 1893, when its special agent examined his books, and he admitted his defalcation, of which the surety was notified within a week thereafter. The letter was not sufficient to justify the proposed findings.

Judgment affirmed.

SURETYSHIP—EVIDENCE.—The admissions of a principal are evidence against his sureties to establish liability on the part of the principal for which the sureties are also answerable: *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588; 60 Am. St. Rep. 417, and note. But they must be made in the course of the business for which the surety obligates himself so as to become part of the *res gestae*: *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129.

SURETYSHIP—NOTICE OF DISHONESTY—WHEN RELEASES SURETY.—In case of a continuing suretyship for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the service, and, if, instead of dismissing him, he continues him in his employ without the consent of the surety, express or implied, the latter is not liable for any loss arising from the dishonesty of the servant during the subsequent service: *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210. But in order to have such effect there must be evidence not only of a default, but also of fraud and dishonesty on the part of the employé: *Atlantic etc. Tel. Co. v. Barnes*, 64 N. Y. 385; 21 Am. Rep. 621. The default must be such as points to moral turpitude or lack of integrity, rather than a want of diligence or punctuality: *Charlotte etc. R. R. Co. v. Gow*, 59 Ga. 685; 27 Am. Rep. 403.

KERN v. FIELD

[68 MINNESOTA, 317.]

HOMESTEADS—EXTINGUISHMENT BY DIVORCE.—After a husband and wife have resided on her property as their homestead until he has acquired a homestead right therein, an absolute divorce obtained by her against him terminates his homestead right.

MARRIAGE AND DIVORCE—CONFLICT OF LAWS.—If a party goes from one state to another, and is actually a resident of the latter state at the time of commencing an action for divorce in the courts of that state, the judgment of divorce rendered therein is valid, though irregular by reason of the fact that such party has not resided in that state as long as its laws require before commencing the action.

HUSBAND AND WIFE—INJUNCTION.—A husband who has lost his homestead right in the property of his wife by divorce obtained by her against him, may be enjoined from committing trespasses, petty annoyances, and acts of disorderly conduct on the homestead premises.

D. W. Bruckart, for the appellant.

G. E. Qvale, for the respondent.

317 CANTY, J. 1. In 1891 the wife of defendant entered into an executory contract for the purchase of a certain hotel property situate at Willmar, in this state. She entered into possession of the property, conducted an hotel business thereon, and she and defendant resided on the premises, and the same was their homestead, until 1894, when she received notice from

the grantee of the vendor declaring the executory contract forfeited by reason of default in performance on her part. Within a few days thereafter she made to said grantee a written instrument purporting to surrender the premises to him, but it was not signed by her husband. She then left this state, went to ³¹⁸ North Dakota, and about four months thereafter commenced in that state an action of divorce against defendant, the papers therein being served on him in this state. In less than three months thereafter a judgment of divorce was entered therein, he having failed to appear or defend.

Immediately after her departure from this state said grantee made to her sister, the plaintiff in this action, a new contract for the sale of the property to plaintiff, and she immediately took possession of the hotel, and has ever since managed the business of the same. Defendant occupied a room in the hotel at the time, and thereafter for about five months boarded with plaintiff. He surrendered this room to her, and took from her another. He failed to pay his board bill, was and still is insolvent, and refused to leave the premises, claiming the same as his homestead. When ejected from one room, he took possession of another, occupied any room he saw fit, keeping out the guest assigned to such room, was guilty of disorderly conduct, and advised and induced guests to go to the rival hotel. He persisted in this course of conduct, though he was repeatedly ordered by plaintiff to keep off the premises. After the entry of the decree of divorce above mentioned, this action was commenced to enjoin and restrain him from interfering with her said hotel business, or her possession of the premises. On the trial before the court without a jury, the court found for plaintiff. From an order denying a new trial, defendant appeals.

Conceding, for the purposes of the argument, that, as defendant contends, the defaults aforesaid were waived by the vendor, and that the contract of sale to Mrs. Field was not forfeited by these defaults, or surrendered by said written instrument signed by her alone, but was still in force when this action was commenced, still, if the judgment of divorce is valid, it terminated defendant's homestead right in the premises. He had ceased to be her husband, and had, therefore, ceased to have any homestead right in her property. While, as a married woman, she could not, without her husband's signature, surrender her contract, still she could legally deliver the mere possession, at least, of all of the hotel and premises not actually occupied by the family for their private use. Not only did Mrs.

Field do all in her power to deliver the possession of the hotel to said grantee, who in ³¹⁹ turn delivered it to plaintiff, but defendant himself acquiesced in and ratified such delivery of possession by making no objection thereto, and by becoming the boarder of plaintiff in the hotel. Subsequently he surrendered his room to her, and accepted another one from her, so that she had complete possession of the hotel by the consent and acquiescence of both defendant and his wife. Conceding, without deciding, that, as against defendant, plaintiff was still a mere licensee, and that he could revoke the license, and retake possession, and assert and protect his homestead right, the subsequent judgment of divorce, if valid, cut off his homestead right, and his power to revoke such license. Under such circumstances, plaintiff had at the commencement of this action such possession as would enable her to maintain this action against such a stranger as defendant had become.

2. But appellant contends that the judgment of divorce should be held void. There was no evidence introduced to show what the laws of North Dakota regulating divorce proceedings were. Appellant contends that we should presume that the laws of that state are the same as the laws of this state, and that the party must reside in the state one year before bringing an action for divorce. Whether this court will so presume, or whether, for the purpose of giving full faith and credit to the judgment of a sister state, we must take judicial notice of the laws of that state (2 Black on Judgments, sec. 860), we need not now decide. The court below found that Mrs. Field went to North Dakota to reside, and has ever since resided there. The evidence supports this finding. Even if we should, for the purpose of ascertaining the effect to be given to this judgment, presume that the laws of that state are the same as our own, the judgment would still be effective. In *Thurston v. Thurston*, 58 Minn. 279, we held that, if the party is actually a resident of the sister state at the time he commences the action, though he has not resided in that state as long as its laws require before commencing the action, the judgment is valid, though irregular. The irregularity does not go to the jurisdiction. Appellant questions in this court the bona fide character of Mrs. Field's residence in North Dakota, but the court below has found against him on that point.

3. The repeated trespasses, petty annoyances, and other acts of defendant, with the other facts found by the court, made a case for a ³²⁰ permanent injunction, as ordered. This disposes

of all the questions raised having any merit, and the order appealed from is affirmed.

HOMESTEAD—EXTINGUISHMENT BY DIVORCE.—A decree of divorce which destroys the family destroys the homestead right: *Bahn v. Starcke*, 89 Tex. 203; 59 Am. St. Rep. 40, and note; note to *Alt v. Banholzer*, 12 Am. St. Rep. 686. Divorce a vincule terminates all the husband's estates in the wife's realty by virtue of coverture, and the wife is restored to her estate absolutely and entire as she enjoyed it prior to her marriage: See monographic note to *Boykin v. Rain*, 65 Am. Dec. 358.

MARRIAGE AND DIVORCE — CONFLICT OF LAWS — DIVORCE IN FOREIGN JURISDICTION.—To give validity to the decree of a court, in a suit for divorce, one at least of the parties must be a resident of the state or territory in which the decree is rendered: *Watkins v. Watkins*, 125 Ind. 163; 21 Am. St. Rep. 217. A divorce obtained in another state by a husband from his wife, who has always lived in this state, for her desertion of him, is valid if he did not become a resident of the other state for the purpose of procuring the divorce, if the cause of action is one recognized by both states, and the separation of the wife from her husband was not for justifiable cause: *Loker v. Gerald*, 157 Mass. 42; 34 Am. St. Rep. 252, and note. On the general subject, see monographic notes to *Hanover v. Turner*, 7 Am. Dec. 206-209; *Tolen v. Tolen*, 21 Am. Dec. 747-752.

STATE v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[68 MINNESOTA, 381.]

POLICE POWER.—PUBLIC STORAGE AND WAREHOUSE BUSINESS. is subject to the police power of the state to adopt such reasonable regulations as the legislature may deem necessary for the protection of the public who intrust their property to those carrying on such business.

POLICE POWER — WAREHOUSEMEN — COMMON CARRIERS.—It is within the police power of the state to adopt any reasonable regulations for the preservation and protection of property which has been transported to its place of consignment by a common carrier, and is abandoned, or not claimed within a reasonable time, by the consignee or owner.

POLICE POWER—TO WHAT EXTENT MAY BE EXERCISED.—If a business is a proper subject of police regulation the legislature may, in the exercise of that power, adopt any measures they see fit, provided only that they adopt such as have some relation to, and have some tendency to accomplish, the desired end; and if such measures have been adopted, and do not violate some provision of the constitution, the courts cannot assume to determine whether they are wise or the best that might have been adopted.

POLICE POWER.—LAWS ENACTED IN THE EXERCISE of the police power must be police regulations in fact, and if they do not conduce to any legitimate police purpose, but amount to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, they must be declared unconstitutional.

POLICE POWER—WAREHOUSEMEN—CARRIERS.—The police power, when exercised over carriers or warehousemen, must be confined to such restrictions and burdens as are necessary to promote the public welfare, or, in other words, prevent the infliction of a public injury.

POLICE POWER—REGULATION OF CARRIERS.—A statute requiring railways and transportation companies to turn over to a licensed storage company or public warehousemen all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional, and not a legal exercise of the police power.

W. H. Norris, T. B. Kellogg, D. W. Lawler, M. D. Grover, C. Wellington, and M. D. Munn, for the appellants.

H. W. Childs, attorney general, and M. L. Countryman, for the state.

³⁸³ MITCHELL, J. The defendants in these actions were severally indicted for a refusal to turn over to a public warehouseman certain goods which had not been called for by the consignee, pursuant to the provisions of the Laws of 1895, chapter 149, section 11, entitled, "An act to license and regulate the business of storage companies and public warehousemen (other than warehousemen of grain in bulk) and to provide a penalty for violation of the same."

Section 1 of the act provides that: "The governor may license any suitable person, persons, or corporations ³⁸⁴ established under the laws of this state, and having their place or places of business within this state, to carry on the business of storage companies or public warehousemen, who may keep and maintain public warehouses for the storage of goods, wares and merchandise, et cetera, excepting grain in bulk. Said license must be obtained within thirty days from and after the passage of this bill, upon the payment into the treasury of the state of the sum of ten dollars, and annually thereafter, by the payment of a like sum, to be credited to the school fund of the state."

Section 9 makes it unlawful for anyone not duly licensed under the provisions of the act to conduct or carry on the business of a storage company or warehouseman in this state. Section 10 makes a violation of the provisions of sections 9 and 11 a misdemeanor punishable by fine. Section 11, under which the indictments were drawn, reads as follows:

"Sec. 11. This act shall not be construed to apply to any railroad or transportation company who holds goods, wares, or merchandise in cars, freighthouses or warehouses for a period not exceeding twenty days after receipt; provided, such railroad

or transportation company shall, within forty-eight hours after the receipt of such goods, wares, and merchandise, notify the consignee of the arrival thereof in writing, and in case such consignee, or his assigns, fails and neglects to call for or receive said goods, wares, or merchandise within twenty days after such receipt of same by any railroad or transportation company as aforesaid, said railroad or transportation company must then turn over said goods, wares, or merchandise to a storage company or public warehouseman, licensed as in this act provided, upon the payment of the charges of said carrier thereon, which charges thus paid by said storage company or warehouseman to said carrier shall be a lien on said goods, wares, or merchandise, and enforceable in accordance with sections 1, 2, 3, and 4, chapter 202 of the General Laws of 1885."

Among other objections to the sufficiency of these indictments, it is urged that the act in question is unconstitutional. The act is certainly a remarkable one. Its provisions contain strong intrinsic evidence that the real purpose of it was not the protection of the public by regulating public warehousemen or by adopting reasonable regulations for the preservation of unclaimed property in the hands of common carriers, but to subserve the interests of a certain class of warehousemen. We have no doubt that the public storage and warehouse ³⁸⁵ business is one that is subject to the police power of the state to adopt such reasonable regulations as the legislature may deem necessary for the protection of the public who intrust their property to those carrying on such a business. We may also admit that it is within the police power of the state to adopt any reasonable regulations for the preservation and protection of property which has been transported to the place of its consignment by a common carrier, and is abandoned, or not claimed within a reasonable time, by the consignee or owner. It is also true that, where a business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt any measures they see fit, provided, only, that they adopt such as have some relation to and have some tendency to accomplish the desired end; and if the measures adopted have such relation or tendency, and do not violate some provision of the constitution, the courts will not assume to determine whether they are wise or the best that might have been adopted.

But, while the police power of the state is a very extensive one, it is not without limits. A law enacted in the exercise of the police power must be a police regulation in fact. If it

will not conduce to any legitimate police purpose, or if it amounts to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, the courts have a right, and it is their duty, to declare the law unconstitutional. The business of a common carrier and the storage and warehouse business are both lawful without any license or authority from the state. Every one has a right to engage in them, subject only to such regulations and restrictions as are necessary to promote the general welfare. Neither of them is a business which the state has any right to prohibit altogether, or to limit to a favored few by giving them a monopoly of it. Therefore, the police power must, when exercised over them, be confined to such restrictions and burdens as are necessary to promote the public welfare, or, in other words, to prevent the infliction of a public injury.

If the first section of this act is to be construed literally as it reads, it would give a monopoly of the public storage and warehouse business to those to whom the governor granted licenses "within thirty days from and after the passage of the act." Under such a construction, the act would be clearly unconstitutional. Again, while the act ³⁸⁶ requires every storage company or warehouseman to receive and store all property offered for such purposes by any person, without discrimination, it nowhere, at least in express terms, requires them to advance the charges of the carrier. If they may consent or decline, at their option, to advance these charges, the law would have no reasonable tendency to protect and preserve unclaimed property. It would permit the storage company or warehouseman to accept from the carrier only such business as he might deem to his own personal advantage, and reject the balance. Further, if the proviso to section 11 is to be construed as it seems to read, it would absolutely compel every common carrier in every instance to notify the consignee of the arrival of the goods within forty-eight hours, and, in case he did not call for or receive the goods within twenty days, to turn them over to a warehouseman, without regard to what agreement or arrangement to the contrary there might be between the carrier and the consignor or consignee, as, for example, that the goods should be shipped or held by the carrier for future delivery. If this is the proper construction of the act, it is clearly unconstitutional, as being an arbitrary and unwarranted interference with the right of parties to contract with reference to the disposition of their own property.

But we shall assume that the law might be cut down by judicial construction so as to obviate all these objections, and that we would be justified in holding that the storage and warehouse business is not limited to those who obtained licenses within thirty days after the act was passed; that public warehousemen are required to advance the charges and receive all unclaimed property tendered them by a common carrier, regardless of the amount of the charges or the value of the property, a construction which we apprehend warehousemen would be loth to assent to; and that the only property which carriers are required to turn over to a warehouseman is property shipped for immediate delivery, and which remains unclaimed for twenty days, in the absence of any agreement between the carrier and consignee that the former should continue to hold it for the latter. There is still an objection to the law which is fatal to it.

There are, and necessarily will be, many places in the state where there is no storage company or public warehouseman who has complied with the provisions of this act. We are justified in stating, by ³⁸⁷ way of illustration, the fact that there are only three places in the state, St. Paul, Minneapolis, and Duluth, where anyone has complied with the provisions of this act and taken out a license. But under this law, wherever the place of consignment may be, even if at the extreme northwestern or southwestern corner of the state, the carrier would be required to transport the goods, or procure them to be transported thence, to a place where there is a public warehouse, and then turn them over. Indeed, it would seem, from the language of the act, that it would be incumbent on the carrier to procure drays or wagons to transport the goods from the depot or landing to the warehouse, and there tender the property to the warehouseman. Such a law, so far from preserving unclaimed property for whom it may concern, would furnish a most effectual way to absorb it with unnecessary costs and charges. It would have no tendency to subserve any public interest, and would impose a most unreasonable burden upon carriers. On this ground we hold that, even if all the other provisions of the act are valid, the proviso in section 11, in so far as it requires common carriers to turn over property to a public warehouse, is unconstitutional.

The orders overruling the demurrers are therefore reversed and the causes remanded, with directions to the court below to dismiss the indictments.

POLICE POWER—WHAT LAWS WITHIN—LIMITS OF LEGISLATIVE DISCRETION.—Laws and regulations necessary for the

protection of the lives, morals, and safety of society are strictly within the legitimate exercise of the police powers of the state, if reasonable and not prohibited by either the state or the national constitutions: *Ford v. State*, 85 Md. 465; 60 Am. St. Rep. 337. A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts: *Colon v. Lisk*, 153 N. Y. 188; 60 Am. St. Rep. 609. As to the various businesses which may be the subject of state regulation because affected by a public use, see monographic note to *San Diego Water Co. v. San Diego*, 62 Am. St. Rep. 290. See, also, notes to *State v. Goodwill*, 25 Am. St. Rep. 882; *Chicago etc. R. R. Co. v. State*, 53 Am. St. Rep. 572. Statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185.

KRUEGER v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

[68 MINNESOTA, 445.]

RAILROADS—MILEAGE TICKETS—DAMAGES FOR EJECTION OF PASSENGER.—If a person purchases a two thousand miles mileage railroad ticket, with the date of issue stamped thereon, and containing a margin punch which by mistake makes it expire on the day of issue instead of one year afterward as intended, and he subsequently presents his ticket in payment of his fare, and, upon its being refused, he refuses to otherwise pay his fare, and is thereupon ejected from the train, he is entitled to recover damages, although he has become a party to a contract printed on the ticket that it shall become void for passage after the date punched in the margin.

RAILROADS—MISTAKE IN MILEAGE TICKET.—If a person purchases a railroad ticket containing two thousand miles of passenger transportation, and it is limited, though by mistake, to expire on the day of issue, such limitation is necessarily void; and the purchaser is not compelled to stand upon the contract as written in the ticket, nor to have the mistake reformed in equity, before he can ride upon the ticket, and insist that the carrier shall perform it as it should have been written, or pay damages for a failure to do so.

RAILROADS—MISTAKE IN TICKET—EJECTION—RULE OF DAMAGES.—If a ticket presented by a passenger appears on its face to be void, he cannot increase his damages by refusing to leave the train, thus compelling his ejection by force, unless, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger.

M. L. Cormany, for the appellant.

L. K. Luse, H. Conlin, and T. A. Polleys, for the respondent.

⁴⁴⁷ CANTY, J. Plaintiff alleges that he was a passenger on defendant's train, was ejected therefrom by the conductor, and claims damages therefor. On the trial, the court dismissed the action at the close of plaintiff's evidence, and from an order denying a new trial plaintiff appeals. It appears by the evidence that plaintiff is a traveling man. On June 29, 1895, he purchased of the railroad station agent at Redwood Falls, in this state, a mileage ticket or book in the ordinary form, containing two thousand miles of transportation, for which he paid fifty dollars. There was a contract printed on the cover which he signed. The date of issue was also stamped on the cover, and on the margin of the cover was a series of dates, the proper day, month, and year in which were to be punched so as to indicate the time when the right to use the transportation would expire. By mistake, the date June 29, 1895, was punched, so as to make the transportation expire on the day it was issued, instead of a year later, as was intended. The ⁴⁴⁸ year 1895 was punched instead of the year 1896. The contract so signed stated, among other things, that the two thousand mile ticket was issued for the exclusive use of plaintiff, was not transferable, was subject to conditions named therein, and was "void for passage after date canceled in margin."

Plaintiff used this ticket until January 15, 1896, without objection, by which time sixteen hundred miles of the transportation had been torn out of the book, and taken up by the company for plaintiff's fare on its trains, leaving four hundred miles still in the book. On that day, plaintiff boarded defendant's passenger train at Minneapolis, for the purpose of riding thereon to Shakopee, in this state. Between Minneapolis and St. Paul the conductor demanded fare, and plaintiff presented him the mileage-book. The conductor noticed the date at which it was punched to expire, and refused to accept the mileage contained in it for plaintiff's fare. Plaintiff testified: "I told him where I bought it, and about when I got it, and showed him the stamp on the back. He says, 'It is very evident that the book was punched a year by mistake, and you will have to take the book as it is.'"

On arriving at St. Paul, the conductor again demanded plaintiff's fare. Plaintiff refused to pay anything except the transportation in the book, and thereupon the conductor caught him by the arm, and led him out of the car onto the platform. He then hastened to the depot, purchased a new ticket, and again boarded the same train, and rode to his destination.

1. We are of the opinion that there was sufficient evidence to sustain a verdict for plaintiff for some amount, and that the court below erred in dismissing the action. It is contended by respondent that there is no evidence that there was any mistake in punching the date on which the ticket should expire, and no evidence that there was any agreement that the ticket should expire on any other date than the one punched. The point is not well taken. Respondent itself, as a part of its cross-examination, introduced in evidence a bulletin or circular letter to its conductors, signed by its general passenger agent, in which it is stated that this ticket was erroneously limited to expire June 29, 1895, and that it should be honored by the conductors until June 29, 1896, and plaintiff admitted that, shortly after he was ejected, he was shown a copy of this bulletin.

449 2. Respondent also contends that the mileage-book so signed by plaintiff is a complete contract in itself; that it must be reformed in equity to correct the alleged mistake; and that, until so reformed, plaintiff must stand on the contract as written, citing such cases as *Rahilly v. St. Paul etc. Ry. Co.*, 66 Minn. 153; *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146, and *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660. Most of the cases so cited merely hold that, where the passenger signs or accepts such a contract, he is bound by its provisions, whether he read them or expressly consented to them or not. But suppose the contract as written or printed is contrary to the express oral agreement between the parties; must the passenger go into a court of equity, and have the contract reformed, before he can insist that the common carrier shall perform it, or respect it, or pay damages for failure to do so? Would not such a rule of law be contrary to public policy? Is it public policy to throw such a burden on the passenger, and thus to offer a premium on the commission of errors and mistakes by the common carrier, and to shield it in this manner from the consequences of those errors and mistakes? The passenger usually makes his contract for transportation just before entering upon his journey. If he must have his ticket reformed before he can ride upon it, will it not in most cases be worthless to him, especially if the ticket is not transferable or will expire in a limited time? The common carrier is performing a public duty, and is it not contrary to public policy to allow it to adopt any method of doing business which will unnecessarily or unreasonably shield it from the consequences of its own errors and blunders in the performance of that duty, even though such method is adopted

only in cases where it carries passengers at reduced rates? But it is unnecessary to decide these questions in this case, and we do not decide them. The limitation placed on this ticket is necessarily void. No man can ride out either two thousand miles of transportation or fifty dollars' worth of transportation on any ordinary passenger train in one day. The ticket was limited to expire on the day it was issued, and it was impossible for the passenger to get the worth of his money out of the ticket on that day; so that the rate charged him for that day's ride would necessarily be extortionate and illegal, and therefore this limitation was void on its face. Then, if respondent's position is correct, that the parties must ⁴⁵⁰ stand on the contract as written, and cannot prove the oral contract actually made, it would follow that this ticket is unlimited as to time.

3. Respondent further contends that plaintiff did not present to the conductor a ticket apparently valid on its face; that it is a general, necessary, and reasonable rule of all railroad companies that, where a passenger presents a ticket not apparently valid on its face, it is the duty of the conductor to refuse it, and, if the passenger refuses to pay his fare, to eject him; that the passenger is bound to know this rule, and abide by it, and cannot recover damages for being so ejected: Respondent cites Elliott on Railroads, sec. 1594; Poulin v. Canadian Pac. Ry. Co., 3 Co. Ct. App. 23, 52 Fed. Rep. 197, Frederick v. Marquette etc. R. R. Co., 37 Mich. 342, 26 Am. Rep. 531, and other cases which lay down this rule. We are of the opinion that, so far as it goes, the proper rule on this point is stated in Freeman's note to Commonwealth v. Power, 7 Met. 596, 41 Am. Dec. note 475, as follows: "Although the cases on this subject are not entirely consistent with each other, the doctrine deducible from them, and the correct doctrine as it seems to us, is that when one has paid his fare to a certain destination on a railway, to the officer appointed by the company to receive it, the contract for carriage is complete, and he has a right to be carried in accordance with that contract, which cannot be infringed or impaired by any rule of the company or by any mistake or default of its servants. If, by a mistake of one of the officers of the company, he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right nevertheless remains, and if, for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from

such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded, or quit the train; and in either case we think he ought to recover, as a part of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected, being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly, for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used. Such a case stands ⁴⁵¹ upon an entirely different ground from that of a passenger who has a proper ticket, and is nevertheless expelled." Quoted with approval in 4 Elliott on Railroads, 2490, note 3.

But, so far as this rule refuses the passenger damages for being forcibly ejected, it does not apply when, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger. The statements of the passenger need not be accepted in such a case except so far as they call the conductor's attention to facts and circumstances which he can then and there observe. Any other rule would leave the company at the mercy of every one who might try to impose upon it.

Let us now apply to this case the rules of law thus laid down. The evidence is conflicting as to whether or not the date of the ticket stamped on it as aforesaid could be made out when it was presented to the conductor. Plaintiff testified that the date could then be seen, but the conductor, called by plaintiff, testified that the stamp was then so dim that he could not tell when the ticket was issued. If he could not then decipher the date of issue, the ticket sufficiently appeared on its face to have expired, there was nothing to put him on his guard, and he was justified in ejecting plaintiff. In that case Freeman's rule, above quoted, applies. But, if this date could be seen at that time, then it appeared, as we have already shown, that the ticket had not expired. The conductor, as well as everyone else, must be

held to know the law. But, even if it could be held that the conductor was not obliged to know the law, the ticket bore on its face sufficient evidence of a mistake in issuing it to put him on his guard, if the date of issue appeared, at least, sufficient evidence to warrant the jury in finding that it put him on his guard, or should have done so. In any such case, a verdict awarding plaintiff damages for being forcibly ejected would be sustained.

The order appealed from is reversed, and a new trial granted.

RAILROAD COMPANIES—LIABILITY FOR EJECTING PASSENGERS—MISTAKE OF COMPANY'S AGENT.—If, by the fault of an agent of a railroad company, a passenger takes the wrong train, or is without a ticket, or has one imperfectly or erroneously stamped, and is ejected for this or any similar reason by the conductor of the train in pursuance of the rules of the company, it is liable to him as for a tort: *Pittsburgh etc. Ry. Co. v. Reynolds*, 55 Ohio St. 370; 60 Am. St. Rep. 706. Or where a passenger purchases a round-trip railway ticket, and the first conductor to whom it is handed, by mistake, returns to the passenger the wrong end of the ticket, and the conductor on the return trip, ignoring the passenger's explanation, refuses to accept his ticket, and ejects him for want of a proper ticket, the railway company will be liable in damages for so ejecting him: *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309. This would seem a more proper rule than to allow the company to plead in defense of an action of tort the mistakes of its own agents, and to limit the injured passenger to an action on the contract, though the latter rule has been adhered to: *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913; note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 571. But compare *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434. Where a passenger is on the train by mistake induced by an agent of the company, it is not necessary in such case for him to invite force to be exerted by the conductor to secure his rights—certainly not to increase his damages: *Atchison etc. Ry. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780. See, also, monographic note to *Commonwealth v. Power*, 41 Am. Dec. 477-480.

TOWER v. TOWER AND SOUDAN STREET RAILWAY CO.

[68 MINNESOTA, 500.]

RAILWAYS—FORFEITURE OF FRANCHISE—NONUSER.

If a city grants to a street railway company a franchise to construct, maintain, and operate a street railway on any and all of its streets for a period of twenty years, such railway to be propelled by horses, mules, steam, electric, or other motor "upon condition that the company faithfully fulfill the requirements herein expressed, and should the company fail herein or willfully abandon such road, and neglect, or refuse to operate it, then this franchise to become null and void, and the company agree that they will forfeit such road to the city of Tower in one year after said company cease to operate said road," the word "road" as here used has the same import as if it read "railroad"; and if said company, though insolvent, neglects, refuses, and ceases to operate its road for more than one year, it works an absolute forfeiture of its franchise, including its rails, ties, roadbed, and all things granted.

RAILROADS—FORFEITURE OF FRANCHISE.—If a city grants to a street railway company a franchise to construct, maintain, and operate a street railway on its streets, upon condition that if such company should fail to build or willfully abandon such road, and neglect or refuse to operate it, the franchise shall become null and void, and the company agrees to "forfeit" the road to the city in one year after it ceases to operate it, the word "forfeit" is not to be construed as providing for a nonenforceable penalty nor for liquidated damages, but shows a grant upon conditions which, if broken, create a forfeiture of the franchise including cars, rails, ties, roadbed, and all things granted.

RAILROAD FRANCHISES are made for the benefit of the public; and where the conditions upon which they are allowed to be created are voluntarily violated by the grantee, and it is impracticable or impossible to recover compensation in damages, the grant may be annulled and the franchises forfeited as provided for in the grant.

W. G. Bonham, for the appellant.

J. Jenswold, Jr., Draper, Davis & Hollister, and H. J. Gran-
nis, for the respondents.

⁵⁰² BUCK, J. The plaintiff is a municipal corporation in the county of St. Louis, and one of the defendants is a corporation created and existing under the laws of this state. The defendant Crassweller is its receiver, and the American Loan & Trust Company, defendant, claims some interest in the property hereinafter referred to. On March 18, 1890, the common council of the plaintiff corporation, having the power so to do, passed an ordinance granting to and authorizing the defendant Tower & Soudan Street Railway Company, its successors and assigns, the right and privilege of constructing, maintaining, and operating a line or lines of street railway on any and all streets, avenues, alleys, and bridges or public highways of said city for a period

of twenty years from and after the passage of the ordinance, the cars thereon to be propelled by horses, mules, steam, electric, or other motor, as the company might determine, for the purpose of transporting passengers and freight. The grant was made upon various conditions, among others that it should have in operation a continuous line of railway from and to certain specified points, and the twelfth section of the ordinance reads as follows: "This franchise is granted upon condition that the company faithfully fulfill the requirements herein expressed, and, should the company fail therein, or willfully abandon such road, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road."

There were certain other conditions in the ordinance beneficial to each party, not necessary to enumerate. But the railway company, prior to the day of the passage of the ordinance, applied to said ⁵⁰³ city to issue its bonds to aid in the construction of said railway, and on the day when said ordinance was so granted the legal voters of said city voted to issue bonds of the denomination of six thousand dollars to said railway company in aid of the construction of said railway, which bonds were duly delivered to and accepted by said company as part consideration for said railway company's agreement to construct, maintain, and operate said street railway for a period of twenty years from and after the date of said grant. Said railway company constructed its line of railway according to its agreement and the conditions of said ordinance, and operated the same until about March 4, 1894, when said company, without any fault on the part of this plaintiff and against the protests of its officers, wholly ceased, neglected, and refused to operate said road; and thereupon, on November 26, 1895, plaintiff's city council passed an ordinance declaring the franchise of said Tower & Soudan Street Railway Company to be null and void on account of its failure to operate said railway after March 4, 1894, and for its willful abandonment of the same.

Part of the road of said railway company consists of eleven thousand five hundred yards of steel T-rails, of the value of two thousand three hundred dollars. The railway company becoming insolvent, the defendant Crassweller was appointed its receiver, and plaintiff, having received due authority from the court, brought this suit against him and the other defendants named, for the purpose of having the title to said steel

rails determined, and prayed judgment that all the rights of the defendant Tower & Soudan Street Railway Company under the contract hereinbefore set forth be forfeited, and that plaintiff be adjudged entitled to the absolute ownership and possession of said steel rails free and clear of all claims, demands, and liens of any and all the defendants in this action. The receiver and the trust company interposed demurrers to the complaint upon the grounds that upon the face of said complaint it did not state facts sufficient to state a cause of action. The court sustained the demurrers, and the plaintiff appeals.

The two material questions raised and discussed were: 1. Does the word "road," as used in section 12 of the ordinance, refer to the franchise, or does it include the steel rails forming a part of the roadbed? and 2. Does the word "forfeit" in said section provide for a penalty of such a nature that it is non-enforceable as such against the railway company?

⁵⁰⁴ Upon the first question very little need be said. The word "road," as used in section 12, includes the roadbed, with the ties, rails, and all that constitutes a completed superstructure on which cars transported passengers or property, or both. By reference to our statutes upon the subject of railroads, it will be found that in numerous instances the word "road" is used in the same sense and with the same meaning as "railroad." Of course, whether the word "road" is used as synonymous with, or the equivalent of, "railroad," depends upon its context. In the section above quoted it has the same import as if it read "railroad."

Upon the second question counsel have discussed the question as to whether the sentence, "Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road," was to be construed as nonenforceable penalty or as liquidated damages which could be recovered. We do not agree with either counsel, but think that the ordinance shows a grant upon conditions which, if broken by the grantee, creates a forfeiture. The demurrer admits that the conditions were broken, and the law adjudges the forfeiture. The nonuser went to the very essence of the contract between the city and the railway company. The privileges granted and consideration furnished by the city to the company had in view the construction and continued operation of the railway for a period of twenty years, and upon these conditions the consideration and special privileges were granted to the company. The complete suspension of the operation of the

railway for more than one year brought about this forfeiture of their corporate rights. Upon these conceded facts there was no discretion in the trial court as to the course it should have pursued, and it should have overruled the demurrers instead of sustaining them.

This was not a state franchise, but a grant of authority from the city of Tower resting in contract, and redress for violations of such contract, as in other violations where public interests are involved, should be had by the usual remedies. The rule as to forfeiture, in cases of this kind, should be regarded in its nature analogous to forfeitures frequently determined where the state is concerned as a party, and brings suit against a corporation for violation of its chartered privileges. The case of *State v. Minnesota Cent. Ry. Co.*, 36 Minn. 246, is an illustration of this rule. There the state granted ⁵⁰⁵ to the railway company all the rights, franchises, and property of the Minneapolis & Cedar Valley Railroad Company, which was incorporated by the act of the territorial legislature in 1856, by which act it was authorized to construct and operate a certain railway, and by a subsequent act it was endowed with the lands granted by an act of congress to aid in the construction of the line of railroad which by its charter it was authorized to build. It failed to comply with the conditions upon which its franchises were granted. The General Statutes of 1878, chapter 76, section 11, and the General Statutes of 1894, section 5899, then provided that whenever any railroad corporation should for one year suspend the lawful business of such corporation, such company or corporation should be deemed to have forfeited the rights, privileges, and franchises granted by any act of incorporation or acquired under the laws of this state, and should be adjudged to be dissolved; and the court held that, under this statute, there was no room for any discretion on the part of the court, when the facts clearly appeared, to refuse judgment of forfeiture, and that the terms of the statute admitted of no excuse or explanation, but were mandatory, and that the government might resume its corporate franchises for a misuser or nonuser thereof.

In the case of *Farnsworth v. Minnesota etc. R. R. Co.*, 92 U. S. 49, the court held that where a grant of land and connected franchise is made to a corporation for the construction of a railroad by a statute which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act, without judicial pro-

ceedings to ascertain and determine the failure of the grantee. In the opinion it is also stated that where there is a mere contract between the parties a court will relieve when compensation can be given, but that a forfeiture will be upheld on considerations of public policy, as well as from the impossibility of obtaining compensation from the railroad company for its default, on the same principle upon which courts of equity refuse relief against forfeitures incurred under the by-laws of corporations for the nonpayment of stock subscriptions. In regard to the rule that forfeitures are regarded with disfavor the court further said, at page 68: "But it is said that provisions for forfeiture are regarded with ⁵⁰⁶ disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

The case of *Sparks v. Liverpool Water Works Co.*, 13 Ves. 428, illustrates this doctrine. The company there was incorporated to supply the town and port of Liverpool with water, and the property in and the profits of the undertaking were vested in the company in such shares and subject to such conditions as should be agreed upon. By articles of agreement, a committee of the company was authorized to call upon the shareholders for the several sums payable by them on their respective shares; and it was, among other things, provided that, in case any shareholder made default in the payment of his calls for twenty-one days after the time appointed, and for ten days after subsequent notice addressed to his then or last usual place of abode, his share or shares should be absolutely forfeited for the benefit of the other members of the corporation. The plaintiff was the owner of certain shares of stock in the company upon which payment had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted through his failure to receive personal notice of the call, it having been sent to his town residence while he was absent in the country, and not having been forwarded to him. For the nonpayment upon the call his shares were declared forfeited. Immediately upon receiving information of the call, on his return to the city, he gave directions for its payment, and on the following day the

amount was sent to the bankers of the company. The committee of the company, however, informed him that they could give him no relief, as they had acted according to the laws of the company, from which no deviation could be made. The plaintiff thereupon filed a bill for relief against the forfeiture, on the grounds of accident, and that compensation might be made, and no injury be sustained by the company, his counsel also insisting upon the invalidity of the by-law as unreasonable, exorbitant, and uncertain; but the court dismissed the bill for the reason ⁵⁰⁷ that the enterprise was a public undertaking, requiring for its successful prosecution punctuality of payment from the shareholders. Consideration of public policy forbade the granting of relief; for, as the court observed, "if this species of equity is open to the parties engaged in these undertakings, they could not be carried on."

The recovery of damages was not sought in the cases cited, and it is apparent that it would have been impracticable, if not impossible, to have adopted any rule of damages, and the same doctrine would apply to this case. There was no dispute in those cases but what the conditions were violated, and hence, applying the statutory law except in the case last cited, the things granted were forfeited by its express provisions. It was the legislative rule, not that damages should be recovered in the way of a money judgment, but that, if there was a noncompliance with the terms of the grant, there should be a forfeiture of the thing granted. That the legislature has the power to attach limitations and restrictions upon its grants, to the extent of a forfeiture of the thing granted, is undoubted. Railroad franchises and grants are made for the benefit of the public, and, where the conditions upon which they are allowed to be created are voluntarily violated by the company, it places itself in a position where its grant may be annulled by a forfeiture as provided in the law.

In the case at bar, the ordinance having been accepted by the railway company, it became its charter, and between the parties a contract, and from the very nature of the public business to be carried on, if it suspended operations for one year, its road was to be forfeited. The remedy was not by way of damages, for that might still leave the company in existence, but insolvent, as in this case, and with perhaps a doubtful claim to the exclusive privileges granted by the ordinance, and thus greatly embarrass the city dealing with other companies who might seek the privilege of constructing in said city another railway over the same

route. Here, the conditions of the grant having been violated, the forfeiture arises by the express terms of the contract, and at the end of the time limited the road was to be forfeited to the city. Even if the city did not have the absolute right to declare the rights and franchises of the company forfeited and terminated, and take immediate ⁵⁰⁸ possession of the "road" and all things embraced within the meaning of that term, yet there can be no doubt of its power to maintain an action of this kind, and if, by answering, the defendants can show on the trial any legal or equitable defense, that is a matter for further adjudication.

The counsel for the respondents strenuously contend in their brief that the parties did not intent that the railroad company should make compensation to the city in case of default by non-user, and upon this point they use the following language: "In the case at bar, the ordinance does not indicate, in any of its terms, that the forfeiture referred to in section 12 is to be treated as compensation to the city for any injury suffered, or for the breach of any contract or obligation on the part of the railway company. In no part of the ordinance is there any reference to any compensation to be paid the city for anything which the company may do thereunder."

We agree with counsel upon this point, but this concession is one favorable to the appellant, not to the respondents. Money compensation was not intended by the parties, and, as we have already stated, could not well be obtained for default of the defendant railway company. The absence of any agreement for compensation by reason of such default adds strength to the doctrine that the forfeiture clause should be declared absolute. The cases cited are in a great measure based upon the rule that where no compensation can be made for default of the party in the construction of public works or nonuser of a franchise, and where the public are interested, such as the operation of a railway, an absolute forfeiture will be declared.

Order reversed.

CANTY, J., dissenting. I cannot concur in all that is said in the foregoing opinion. The question before us is simply this: When a condition attached to a grant is broken, and a forfeiture declared, will an action lie to enforce the forfeiture? As a general rule, there can be no doubt that it will lie. If the grantor has done anything to waive the forfeiture, or anything which makes it inequitable to enforce such forfeiture, that is a matter

of defense which must be set up by answer. This is all there is now before ⁵⁰⁹ the court. But the majority opinion seems to go on and decide, or at least intimate, that such a forfeiture cannot be waived; and compare the case to one where the legislature has granted the power or franchise on condition, and has specially provided for forfeiture in case of a breach of the condition. The legislature has a right to change a rule of law, and to provide for a nonwaivable forfeiture in a certain case or class of cases. But ordinarily a city counsel has no such power to change such a rule of law. In the absence of a law which should be interpreted as making the forfeiture nonwaivable, it may well be doubted whether a condition of forfeiture attached to a public grant may not be waived as well as a condition attached to a private grant. But, as before stated, the question of waiver is not now before the court, and should not be passed on at this time. The complaint contains nothing which can be construed into a waiver, and therefore states a cause of action.

FRANCHISES—NATURE AND FORFEITURE OF—STREET RAILROAD COMPANIES.—A franchise is deemed to be a public trust: See monographic note to Brunswick etc. Co. v. United Gas etc. Co., 35 Am. St. Rep. 393. If a corporation is found guilty of acts or omissions which are expressly declared to be a cause of forfeitures of its franchises, plainly a court has no discretion to refuse such judgment: See monographic note to State v. Atchison etc. R. R. Co., 8 Am. St. Rep. 181. Furthermore, only such acts or omissions are a cause of forfeiture as concern matters which are of the essence of the contract between the state and the corporation, or in other words, in which the public have an interest: See monographic note to State v. Atchison etc. R. R. Co., 8 Am. St. Rep. 182. A street railway refusing or neglecting to run its cars for considerable periods of time, when, by its charter required to run them for sixteen hours each day, thereby forfeits its franchise: State v. East Fifth Street Ry. Co., 140 Mo. 539; 62 Am. St. Rep. 742. But compare Wright v. Milwaukee Electric Ry. etc. Co., 95 Wis. 29; 60 Am. St. Rep. 74, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ROSELLE v. FARMER'S BANK.

[141 MISSOURI, 36.]

LOTTERIES.—THE VALIDITY OF AN AGREEMENT to pool lottery tickets and share in the proceeds of a lottery to be drawn in another state must be determined by the law of the state where made, and the fact that the lottery is valid in the state where the tickets are drawn does not give them, or an agreement concerning them, validity in another state.

LOTTERIES—INTERSTATE COMMERCE.—A ticket in a lottery authorized at the place of issue is not within the protection of the interstate commerce clause of the federal constitution, nor does such clause give any validity to an agreement, otherwise invalid, concerning such ticket.

LOTTERIES—AGREEMENT CONCERNING.—A contract in the nature of a partnership in lottery tickets is invalid and against public policy, and cannot be made the subject of an accounting and settlement.

Hale & Son and J. W. Sebree, for the appellant.

M. Jourdan, for the appellants.

40 **BARCLAY, C. J.** This appeal is a part of the same litigation described in *Roselle v. Beckemeier* (1896), 134 Mo. 380. The statement of facts then made is applicable to this appeal also, except so far as modified in this opinion.

Mr. McAuliffe was one of the club of seven who agreed to hold, as a joint venture, the tickets they had obtained in the Louisiana lottery. But there is this vital difference between his position and that of Mr. Beckemeier, the claimant in the other case. McAuliffe was not named or provided for in the agreement between the bank, Roselle, Beckemeier, and Tassaró, touching the

collection of the draft for the prize money and the distribution of the proceeds of collection. The one-seventh share of winnings, which McAuliffe might have claimed under the club agreement, was included in the three-sevenths part of the proceeds to be paid by the bank to Roselle when the collection was made (according to the agreement with the bank). But plaintiff did not agree to accept that share for McAuliffe, nor did he recognize the latter's right to any part of the fund at that adjustment. He declared that McAuliffe and Smith would have to get their shares by law if at all; and he told them so immediately afterward. That left McAuliffe to assert his claim to any part of the fund directly against the plaintiff to whom that part of the proceeds was payable. The bank was under no obligation to pay any part of the fund to McAuliffe.

The claim of McAuliffe was tried along with that ⁴¹ of Beckemeier, and with a like result, namely, a finding in favor of McAuliffe for the same amount as found for Beckemeier, one seventh of the fund in court. Plaintiff appealed, after the customary steps for review.

1. The plaintiff, under the agreement with the bank, was entitled to receive the one-seventh share which McAuliffe claims and which the trial court adjudged to him. But it is plain that the validity of McAuliffe's claim depends on the validity of the original agreement to pool the club tickets. That agreement was made at Norborne in this state, and its legality is to be determined by the laws of Missouri. The facts that the lottery, to which the tickets referred, was to be drawn in Louisiana, and that the tickets and the lottery were valid there, do not give the tickets (or the dealings concerning them) validity in this state.

The people of the state of Missouri "have the inherent, sole, and exclusive right to regulate the eternal government and police thereof," subject to the paramount force of the federal laws: Const. 1875, art. 2, sec. 2. The federal laws do not sanction the agreement here in question or add anything toward improving its legal quality as determined by the local law. A ticket in a lottery, authorized at the place of issue, cannot certainly be regarded as within the protection of the interstate commerce clause of the federal constitution; certainly not in view of the legislation of Congress touching lotteries: U. S. Rev. Stats. 1878, sec. 3894; *People v. Noelke* (1883), 94 N. Y. 137; 46 Am. Rep. 128; *Horner v. United States* (1893), 147 U. S. 449.

2. The "club" agreement to share the prize that the ticket of any member might draw is, therefore, to be tested by Missouri

law. Besides the sections of the criminal law quoted in the Beckemeier case, must also be borne in mind the civil statute in regard to gaming which plainly defines a public policy on that subject ⁴² which the courts cannot ignore: Rev. Stats, 1889, c. 73. The effect of that statute is to set the seal of legislative disapproval on gaming contracts. Is an agreement of which lottery tickets form the subject matter a gaming contract? A lottery is a species of gaming, as is settled by authority, if, indeed, authority be needed for so clear a proposition: Lowry v. State (1827), 1 Mo. 722; State v. Kennon (1855), 21 Mo. 262; Commonwealth v. Sullivan (1888), 146 Mass. 142.

By the bargain in the case at bar each member of the club acquired interests in other lottery tickets than his own. That enlargement of his interest in the result of the lottery drawing was obtained by a contract in this state. The agreement was a gaming one in its nature. It increased the chances of each member to win something in the then approaching drawing of lots at New Orleans. It is not essential to determine whether the transaction fell within the class of criminal acts defined in section 3833 of the Revised Statutes of 1889. If it did not precisely do so, it came dangerously near, for that section forbids, under a penalty, anyone to "aid or assist, or be in anywise concerned in the sale . . . of any share or part of any lottery ticket in any lottery, or devise in the nature of a lottery, within this state or elsewhere." Whether the transaction between the club members was strictly a sale within the meaning of this penal law, we shall not now inquire. Considering, however, the terms of that act and of the gaming law, we cannot doubt that the public policy of the state is by them manifestly indicated in disapproval of contracts such as that involved in this case.

In Kitchen v. Greenabaum (1875), 61 Mo. 110, certain dealings in regard to a lottery ticket were held to furnish no ground of action because contrary to public policy, and we do not consider the agreement now in view occupies any better legal ground: Compare ⁴³ Goodrich v. Houghton (1892), 134 N. Y. 115.

A Missouri agreement in the nature of a partnership in lottery tickets cannot, we think, properly be the subject of an accounting and settlement in a Missouri court. Our jurisprudence withholds the aid of the courts for the enforcement of such arrangements, and usually leaves the parties thereto where they have placed themselves. It is true that the plaintiff himself, in the estimation of law, is equally as culpable as the claimant,

whose claim, under the illegal agreement, he defeats because of the rule that in case of equal wrong the party in possession has the better standing. That maxim of the law is not, strictly speaking, a mere defense to an action. It is a rule of public policy, founded on moral principle, and should be enforced by the courts whenever facts are developed justifying its application, whether the rule be pleaded or suggested by any party to the action, or not. The rule is established for the sake of the moral example it affords, not for the benefit of the wrongdoer in possession of illegal spoil: *Seidenbender v. Charle* (1818), 4 Serg. & R. 173; 8 Am. Dec. 682.

There are, no doubt, states of fact which have been held to afford reasons for withholding application of that rule. And sometimes exceptions to it are made by positive law, as, for instance, by the terms of chapter 73 of the Revised Statutes of 1889, permitting money lost at gaming to be recovered. But McAuliffe's claim cannot be located in any of the exceptional classes. Neither plaintiff nor the bank received even the original dollar he paid for his chance in the game. McAuliffe is not seeking to recover back any money he has lost or paid. He only asks the aid of the said court to secure part of a prize fund which his lottery investment is supposed to have won.

⁴⁴ 3. There is no occasion, in this connection, to investigate any supposed distinction between an act made wrong because prohibited by law, and one which is wrong in itself (as many ancient books express it). To quote the language of Judge Lindley, "what judicial tribunals have to regard is the law they are called on to administer; and what is forbidden by that law is illegal, whether it is also forbidden by the laws of morality and religion or not": 5 Lindley on Partnership, *94. The agreement to share in the winnings of the lottery tickets is plainly gaming and is illegal, by force of our organic and statutory law, as against the well-defined public policy of the state. Missouri courts cannot be used to enforce it, on the facts shown.

4. Nor can McAuliffe's claim be elevated into legality by reason of the transaction concerning the collection of the draft by the bank. The adjustment of account then made between the parties present did not amount even to a statement of account between plaintiff and McAuliffe. Plaintiff then made no agreement to account to McAuliffe for the share of proceeds which plaintiff was to receive upon the collection of the draft, nor did he then agree with anyone that McAuliffe should receive any part of the proceeds. So we need not consider what effect an

account stated might have had toward laying a foundation for applying in McAuliffe's favor the principle declared in the Beckemeier case. The facts do not permit the application of that principle.

5. We regret that some of the views above expressed are not entirely in accord with *Hatch v. Hanson* (1891), 46 Mo. App. 323; but with the greatest respect for our learned brethren who participated in that case, we find ourselves unable to concur in all the rulings made therein.

⁴⁵ 6. The finding in favor of McAuliffe is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Macfarlane, Burgess, Robinson, and Brace, JJ., concur.

Judges Gantt and Sherwood, absent.

LOTTERIES—LAWS PROHIBITING—INTERSTATE COMMERCE.—Laws prohibiting lotteries are within the police power of the states, and do not violate the constitutional provision which prohibits state regulation of interstate commerce: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 565.

PARTNERSHIP—ILLEGAL—SUIT FOR ACCOUNTING.—When an illegal partnership enterprise has been completed, one partner cannot refuse to account to the other for the profits on the ground of the illegality of the partnership objects: *Pfeuffer v. Maltby*, 54 Tex. 454; 38 Am. Rep. 631; *Crescent Ins. Co. v. Bear*, 23 Fla. 50; 11 Am. St. Rep. 331.

CONTRACTS—VALIDITY—LAW OF PLACE.—Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place of its execution: *Ruhe v. Buck*, 124 Mo. 178; 46 Am. St. Rep. 439; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690.

WHEELER SAVINGS BANK v. TRACEY.

[141 MISSOURI, 252.]

ACTIONS—RIGHT TO SPLIT.—A single cause of action cannot be split in order that separate suits may be brought for the various parts of what constitutes but one demand.

ACTIONS.—A SINGLE TORT GIVES ONLY ONE CAUSE OF ACTION, and the damages resulting from one and the same cause must be assessed and recovered in one suit.

ATTACHMENT—SPLITTING ACTIONS—ESTOPPEL.—An action for a wrongful attachment on mortgaged goods cannot be maintained by an assignee of the mortgage, who interpleaded in the attachment suit, setting up his right to certain accounts included in the levy, on a part of which he recovered, without making any claim to the goods covered by the mortgage.

ATTACHMENT—SPLITTING ACTIONS—ESTOPPEL.—An action for a wrongful attachment cannot be maintained against the attaching officer and attaching creditor by one who interpleaded in the attachment suit, setting up a claim to and recovering part of the goods, but not that for which damages are sought, although such officer was not, *eo nomine*, a party to the record in the attachment suit.

ATTACHMENT—INTERVENTION—FAILURE TO ASSERT TITLE.—One suing for a wrongful attachment, who has failed to assert his right to the property in his plea in intervention in the attachment suit, cannot escape the effect of such failure by showing that he had no title thereto at the time, if it appears that he owned and controlled a beneficial interest in the property at that time. In such case, he is estopped to maintain such suit.

Dobson & McCune, for the appellant.

Downs, Bower & Barnes, for the respondents.

255 GANTT, P. J. This is an action for damages for the alleged wrongful levy of a writ of attachment upon certain personal property situated in the factory of the **256** Davis Manufacturing Company in Brookfield, Missouri, upon which plaintiff bank claimed to have a chattel mortgage, duly recorded. The defendants Carpenter and Flournoy were the plaintiffs in the attachment suit in the United States circuit court for the western division of the western district of Missouri, in which the defendant Tracey, as marshal, levied upon said personal property, described in said mortgage and in the petition in this case as follows: "All and singular all the manufactured goods now in the possession of said manufacturing company, consisting of doors of various kinds, styles, and patterns, windows, sash, blinds, transoms, railings, moldings, and in fact every manufactured article made by said company to this date, and on hand in the ware-room, factory, or mill, also all the glass, lumber, and material of every kind now on hand belonging to said company for use about its business."

The petition alleges said levy upon said goods as against one C. L. Spaulding, who held said mortgage, was wrongful and unlawful; that the defendants kept and retained said goods and have not returned them to Spaulding or his assignee; that on the 20th of December, 1893, Spaulding assigned the note of the Davis Manufacturing Company to the plaintiff and at the same time his right of action against defendants. Damages are laid at three thousand five hundred dollars.

Among other defenses pleaded in the answer it was averred that on the sixth day of November, 1893, the plaintiff herein

filed its interplea in the attachment suit brought by these defendants against the Davis Manufacturing Company in the United States court "for all articles of personal property averred to have been seized and taken by the defendant Tracey as marshal in said attachment suit, which included the goods mentioned in the petition; that in said suit of interpleader plaintiff recovered judgment for certain personal ²⁵⁷ property on March 9, 1894; that all the taking and seizing of property under said writ was one transaction and occurred at the same time and place, and plaintiff having made its election as to the manner and object of its suing is now barred from suing again upon said cause of action and the judgment on said interplea as to the matters and things herein operated as *res adjudicata*." Reply of general denial was filed.

Before noticing various other defenses set up in the answer and the numerous questions discussed both orally and in briefs by the learned counsel, we deem it highly important to examine this defense of *res adjudicata*, because, if sustained, it will not be necessary to look further. To sustain this plea the defendants offered in evidence the interplea and judgment thereon in case number 1913 in the United States circuit court. The interplea is entitled, "W. I. Carpenter et al. v. Davis Manufacturing Company; Wheeler Savings Bank, Interpleader." Among other things the interpleader states "that under the writ of attachment issued in the above cause the United States marshal (Tracey) has levied upon and seized as the property of the defendant (the Davis Manufacturing Company) in said cause the following described credits, to wit, "various book accounts contained in the ledger of said company, and which were duly sold and assigned to this interpleader, before said attachment writ was levied," et cetera. A long list of the accounts, the name of the debtor, and the amount of each is then stated. It then averred that the company had sold all of said accounts to interpleader, and the defendant in attachment had no interest in them when the writ was served, and prayed that said accounts might be released from said levy. Upon a trial of said interplea the United States court found that of said accounts attached by its marshal, the Wheeler Savings Bank was the owner of and ²⁵⁸ entitled to certain of said accounts which had been assigned to it in writing by the Davis Company amounting to four thousand two hundred and fifty-four dollars and ninety cents and was not the owner of certain unassigned accounts attached by said marshal amounting to two thousand one hundred and seventy-one dollars and thirty-eight cents.

The plaintiff offered and read in evidence the marshal's return on the writ of attachment in the case of Carpenter and Flournoy against the Davis company in the United States court from which it appears that on the eleventh day of July, 1893, at 1:27 o'clock P. M., he levied upon the property described in this action and the chattel mortgage, and also at the same time and by the same levy upon the accounts for which plaintiff bank interpleaded in said cause in the United States court as above mentioned. In said interplea plaintiff did not sue for the goods attached. Upon this state of facts the defendants insist that the plaintiff bank has split its cause of action, and, having had its redress by one action, cannot maintain this second action, which grows out of the same levy, by the same marshal, and at the instance of the same plaintiffs. No rule of law is better settled than that a single cause of action cannot be split in order that separate suits may be brought for the various parts of what constitutes but one demand, and the rule is founded upon the plainest and most substantial justice. It is an old maxim of the common law that, "No one ought to be twice vexed for one and the same cause." It has always been regarded as a matter of concern to the state that litigation should have an end, and that no citizen should be unnecessarily harassed with a multiplicity of suits. That such has been the law of this state for many years, the decisions of the court all attest: *Wagner v. Jacoby*, 26 Mo. 532; *Union R. R. etc. Co. v. Traube*, 59 Mo. 355; *Moran v. Plankinton*, 64 Mo. 337; *Taylor v. Heitz*, 87 Mo. 660. And our adjudications are in harmony with ²⁵⁰ the great weight of authority in this country; *Knowlton v. New York etc. R. R. Co.*, 147 Mass. 606; *Baird v. United States*, 96 U. S. 430; *Brannenburg v. Indianapolis etc. R. R. Co.*, 13 Ind. 103; 74 Am. Dec. 250. And it has been uniformly held that a single tort gives only one cause of action and the damages resulting from one and the same cause must be assessed and recovered in one suit: 1 Ency. of Pl. & Pr. 159. The cases best illustrate the rule. Thus in *Farrington v. Payne*, 15 Johns. 432, damages were claimed for a tortious taking under a writ of attachment, and the court held that the seizure of a bed and the bedquilts was one single indivisible act; that the plaintiff could not recover for taking the quilts in one action and the bed in another. To this general rule there is an exception which was noted by this court in *Moran v. Plankinton*, 64 Mo. 337, in which it was held that a party would not be precluded in consequence of a former suit if such former action was brought

in unavoidable ignorance of the full extent of the wrongs received or injuries done; *Risby v. Squire*, 53 Barb. 280. But the exception is not allowed where the party knew of the conversion at the same time and by the same act, but in his first action omits a part of the property by accidental oversight: *Folsom v. Clemence*, 119 Mass. 473. The learned counsel for appellant bank does not seriously controvert these statements of the law, but insists that they have no application to this case for various reasons, which we proceed to note in their inverse order.

1. He argues that it is not enough that the levy was made at the same time and under the same writ, but it must be of the same character; that the levy upon the accounts in this case was in the nature of a garnishment, whereas the levy upon the personal chattels was complete by seizure. That therefore, being made in different ways, the two levies were of necessity different acts. This contention of counsel was met and ²⁶⁰ fully answered by the St. Louis court of appeals by Judge Thompson in *Fleisch v. National Bank of Commerce*, 45 Mo. App. 225. This statutory levy is more than a mere garnishment. It "impounds whatever debts and rights of action, present or prospective, are exhibited by the accounts contained in those books." The reasoning of that case and the construction therein placed upon sections 539 and 552 of the Revised Statutes of 1889 seem to us eminently sound and conclusive. Under this head counsel further claim that the bank's title to the accounts rested upon an assignment of them, and its title to the mortgaged property was deduced through the chattel mortgage, and that created a different state of facts. In other words, the learned counsel asserts that if an interpleader own two horses, one of which he has purchased from A, and the other from B, and the sheriff or marshal levy upon both at the same time under the same writ of attachment or execution in favor of the same plaintiffs against the same execution or attachment defendant, he can interplead for one, and sue the sheriff in trespass for the other. Unquestionably the law is against him. The levy, if wrongful, constitutes but one trespass and gives but one cause of action, and he cannot thus split his cause of action. In *O'Neal v. Brown*, 21 Ala. 482, the plaintiff was in possession of a stock of goods, a part of which belonged to him in his own right and a portion belonged to him as trustee for others, and he sought to split his action by suing in one case for trespass for his own goods and in another for damages due by levying upon those which he held as trustee, but the court held it was one trespass and one

cause of action, and he could have recovered the full damages in one suit. That case is directly in point and to the same effect is *Pinney v. Barnes*, 17 Conn. 420. This point must likewise be ruled against the appellant bank.

²⁶¹ But again it is urged that while this is an action by the same plaintiff that interpleaded in the United States court for the accounts, the defendant is different. This contention is based upon the assumption that because the marshal was not *eo nomine* a party to the record in the original attachment case and the interplea therein, therefore he cannot avail himself of the judgment on that interplea. In *Burgert v. Borchert*, 59 Mo. 80, this court held the right to interplead in an action of attachment to be in the nature of an action or replevin ingrafted upon the suit by attachment. Nowhere is it more happily defined than by Judge Philips in *State v. Barker*, 26 Mo. App. 487, in which he says: "It is solely the creature of the statute. It is defined by our supreme court (in *Burgert v. Borchert*, 59 Mo. 80) to be in the nature of an action of replevin, ingrafted on a suit by attachment. Its very office and purpose are to determine the question of ownership of the specific chattel, and the right of the sheriff to seize and hold it under his writ. It is so much a substitution for the action of replevin that after its judicial determination the interpleader cannot resort to the action of replevin for the same property. Being thus a substitution for the action of replevin, it must stand, in contemplation of law, as if it were lodged directly against the sheriff by name. . . . Of consequence, the officer who stands as if the action of replevin were against him must be bound by the adjudication. It is no answer to say that the sheriff is not *eo nomine* a party to the record." The sheriff being bound by the judgment on the interplea when not named, *a fortiori* is the interpleader bound thereby who is named. It is too plain for argument that the defendants in this case are the same parties with whom the interpleader contested the ownership of the accounts in its interplea. The rule laid down in *Clark v. Brott*, ²⁶² 71 Mo. 473, that an interpleader may, notwithstanding the decision in his favor on his interplea, recover damages by reason of the sacrifice of his property under an order of sale, or otherwise, does not touch the question of the right to split up his cause of action in his interplea, and is no authority for the contention of the plaintiff bank that it could sue for a portion of its goods by interplea, or replevin, and for damages for the balance. Whatever form of action it adopted it was bound to sue for its whole cause of action at that time, or

stand estopped from afterward suing for the portion purposely omitted.

But finally on this contention it is claimed that the bank's claim to the accounts was the only cause of action it had when it filed its interplea; that at that time it had no right to sue for the mortgaged personalty. An exceedingly interesting question has been mooted and discussed by counsel as to the effect of the indorsement of the note of the Davis company to Spaulding by him to Judge Brownlee. It is insisted by defendants that while the simple transfer of a note passes the securities held by the assignor to secure its payment, it does not without more pass the right of action for a prior conversion of the chattels mortgaged to secure the note or the right to sue for such a tort; that such a right as this last is a matter independent of the debt assigned. Such seems to be the law in Pennsylvania and Illinois. *Morris v. McCulloch*, 83 Pa. St. 34; *Bowers v. Bodley*, 4 Ill. App. 279. But in the view we take of this evidence it becomes unnecessary to decide that point.

No reasonable man can read the evidence of the officers of the plaintiff bank who made the loan for which the note and mortgage of the Davis company was given to Spaulding, and believe for one moment that Spaulding was anything more than the agent of the ²⁶³ bank in taking this paper. The whole transaction was proposed by the bank, engineered by its officers throughout, and not a dollar of it ever left their drawer. The bank was the real owner of the note, and throughout the negotiations directed and controlled the paper, and the masquerading of Spaulding and Judge Brownlee as owners of it is so transparent that no court of justice can for a moment seriously consider the claim that either of those gentlemen ever had any beneficial interest further than as stockholders or attorney for the bank. The bank being the real bank in interest, in possession of the note with power to control the indorsements and assignments, had a perfect legal right to sue upon the contracts made solely and directly for its benefit. Spaulding was the vice-president of the bank, and Mr. Lomax, the cashier, testified: Question by Mr. Davis: "If the Wheeler Savings Bank was making the loan all the time, why did you use Mr. Spaulding's check? A. For the reason that the mortgage was drawn in Mr. Spaulding's name and we wanted it clear on the books of the bank. Q. That is the only reason? A. Yes, sir. Q. It was understood all the time from the beginning that the bank made the loan, and that it belonged to the bank? A. Yes, sir, and the loan was raised by

the bank to three thousand dollars." In a word, the use of the names of Mr. Spaulding and Judge Brownlee was a mere matter of bookkeeping in which those gentlemen acquiesced for the benefit of the bank of which they were officers or attorneys. It is no reflection upon the personal or professional character of either to say that they permitted the use of their names for the accommodation of the bank under such circumstances. While the bank might have prosecuted its claim through them as trustees of an express trust, it was none the less fully authorized to sue in its own name as the real party in interest.

264 It follows from the premises that there is no foundation for the technical argument that the bank did not own the note and mortgage at the time of the levy. It had the same legal and equitable claim thereto then that it has now. It had a perfect right to ratify the action of its officers made in its behalf, and the mere absence of formal entries by its own agents on its own paper cannot be made the excuse for splitting its cause of action.

Our conclusion upon the foregoing questions precludes any recovery by the plaintiff, and it becomes unnecessary to express any opinion upon the invalidity of the mortgage because a majority of the board did not authorize it, or as to whether the by-laws spread upon the records of the Davis company will not be presumed to have been adopted by the stockholders.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

ACTIONS—SPLITTING CAUSES OF.—A plaintiff cannot split up a single cause of action into two or more suits, and if he does so, and recovers part of his demand, this is a waiver of and bar to the residue of his claim: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615. One action only may be maintained for demands already due on the same contract, as for damages arising from a single wrong, although such demands may have fallen due, or such damages have developed at different times: *Bendernagle v. Cocks*, 19 Wend. 207; 32 Am. Dec. 448, and note; *Brannenberg v. Indianapolis etc. R. R. Co.*, 13 Ind. 103; 74 Am. Dec. 250.

ATTACHMENT—RIGHT OF INTERVENTION IN CASE OF WRONGFUL ATTACHMENT.—Persons claiming property which has been seized under attachment are not compelled to intervene in the attachment suit and try their right of property there, but may maintain an independent action to recover its value: *Harris v. Tenney*, 85 Tex. 254; 34 Am. St. Rep. 796. But where he does intervene, he can only show that the property attached is his: *Fleming v. Shields*, 21 La. Ann. 118; 99 Am. Dec. 719. On the origin and nature of intervention, see monographic note to *Brown v. Saul*, 16 Am. Dec. 177-184.

STATE v. DALE.

[141 MISSOURI, 284]

LARCENY—VARIANCE BETWEEN PROOF AND ALLEGATION.—If an indictment charges the theft of "Old Virginia Natural Leaf" tobacco, while the evidence shows that the tobacco stolen was "Let Go" and "Green's Virginia Leaf," the variance between the allegation and the proof is of no avail to the accused, unless material to the merits of the case and prejudicial to the accused.

BURGLARY — RECENT POSSESSION OF STOLEN GOODS—PRESUMPTION.—The recent possession of goods stolen at the time that a burglary was committed, unless rebutted or countervailed in some way, is presumptive evidence of the commission of that crime by the possessor, and, although the prosecuting witness will not swear that the goods are his, yet it is sufficient to go to the jury if he swears that they resemble his.

BURGLARY—NAMING BUILDING.—An indictment for burglary must give the name of the building burglarized.

INDICTMENT—PRESUMPTION.—It is presumed that what an indictment does not charge does not exist.

BURGLARY.—INDICTMENT for burglary drawn under a statute must give the name of the building burglarized in the words employed in the statute, and if to such place the statute adds a descriptive phrase, it must be covered by allegation.

BURGLARY—CONVICTION, WHEN NOT BAR TO SUBSEQUENT TRIAL.—If a statute under which an indictment for burglary is drawn has two separate clauses, it must clearly appear from the indictment under which clause the accused is prosecuted, otherwise a conviction is not a bar to a subsequent trial.

J. T. Harding, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

286 SHERWOOD, J. The defendant (a negro), under an indictment for burglary and larceny, was convicted of the former offense in the second degree, his punishment assessed at three years in the penitentiary, and he appeals to this court.

The indictment charges: "That Bud Dale on or about the twenty-seventh day of March, A. D. 1895, at the county of Vernon and state of Missouri, did then and there feloniously and burglariously break into and enter a certain building of A. E. Forderhase by then and there forcibly breaking the glass, and spreading the iron bars apart at the back of the window of said **287** building there situate, in which divers goods and other valuable things were then and there kept for sale and deposited, with intent the goods, chattels, wares, merchandise, and other valuable things in said building then and there being then and there feloniously and burglariously to steal, take, and carry away, and fourteen plugs of Old Virginia Weed natural leaf tobacco of

the value of one dollar and forty cents of the personal property, goods, and chattels of the said A. E. Forderhase, then and there in said building being found, did then and there feloniously and burglariously steal, take, and carry away, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Missouri."

Section 3526 of the Revised Statutes of 1889, the one upon which the indictment is intended to be drawn, is as follows: "Every person who shall be convicted of breaking and entering: 1. Any building within the curtilage of a dwelling-house, but not forming a part thereof; or, 2. Any shop, store, booth, tent, warehouse, or other building, or any boat or vessel, or any railroad car in which there shall be at the time some human being, or any goods, wares, merchandise, or other valuable thing kept or deposited, with intent to steal or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree."

1. The testimony shows that the tobacco stolen was "Letgo," and "Green's Virginia Leaf," while the indictment charges the tobacco stolen to have been "Old Virginia Weed Natural Leaf." This discrepancy between allegation and evidence is immaterial for the following reasons: In the first place, defendant was not found guilty of larceny. In the second place, even if defendant had been ²⁸⁸ found guilty also of larceny, the difference between the allegata and the probata would amount to nothing under our statute (Rev. Stats. 1889, sec. 4114) unless the court before which the trial was had had found that such variance was material to the merits of the case and prejudicial to the defense of the defendant: *State v. Barker*, 64 Mo. 282; *State v. Wammack*, 70 Mo. 410; *State v. Sharp*, 71 Mo. 218.

2. The indictment was found at the April term, 1895, and charges that on or about the 27th of March, 1895, the burglary and larceny were perpetrated, and the evidence shows this allegation as to date was correct. In the month of March, 1895, after the burglary had occurred and after the occurrence had become public, defendant, with some of the same kinds of tobacco that Forderhase had in his store, came to Joe Manon in his father's store, and whispering to Manon, wanted to sell him some of the tobacco, a bundle of which he had in his pocket, saying he was selling it for a white man in the alley, and that all he would get out of the sale would be a drink. He finally sold several plugs to Thomas for sixty cents. Other testimony of like sort was sufficient to warrant the verdict found by the jury.

And the recent possession of the fruits of a burglary, unless countervailed or rebutted in some way, is presumptive evidence of the commission of that crime, just as in cases of larceny: *State v. Babb*, 76 Mo. 501. And although the prosecuting witness will not swear that the goods are his, yet it is sufficient to go to the jury if he swears they resemble his: *State v. Babb*, 76 Mo. 501. The facts of this case then are sufficient to support the verdict returned by the jury.

3. But notwithstanding the foregoing views, the sufficiency of the indictment remains to be considered. It will be observed that the indictment gives no name ²⁸⁹ to the building. If it was necessary to prove the kind of building it was, then by the same token it was necessary to allege it. Every fact and modification of a fact which is legally essential to a prima facie case of guilt must be stated. In order that a party accused may know what a thing is, it must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged: 1 Bishop's New Criminal Procedure, secs. 81, 519.

And the law, proceeding in that beneficent spirit which presumes innocence until guilt be established, will presume that what the indictment does not charge does not exist: *State v. Barbee*, 136 Mo. 40, and cases cited.

The section of the statute in question contains two clauses. Under the first the indictment must charge that the building is "within the curtilage of a dwelling-house, but not forming a part thereof."

Within the second clause, the indictment must charge that the building is a shop, store, tent, et cetera, giving its correct designation, because in a case of statutory breaking, the indictment must employ the statutory word, as shop, store, office, et cetera. And if to such place the statute adds a descriptive phrase, it must be covered by allegation: 2 Bishop's New Criminal Procedure, sec. 136; *Commonwealth v. Tuck*, 20 Pick. 356.

The indictment before us is bad, therefore, under either clause of the section upon which it is based: *State v. South*, 136 Mo. 673; *State v. Schuchmann*, 133 Mo. 111.

And it affords no intimation under which clause of that section he will be prosecuted, nor will the judgment rendered afford defendant any protection against further prosecution. The point of the insufficiency of the indictment has not been raised by defendant's counsel, but discharging our duty of examining the ²⁹⁰ record, we could not omit to discuss such obvious insufficiency as the indictment presents.

Because of this defect, the judgment must be reversed and the cause remanded.

All concur.

LARCENY—INDICTMENT—VARIANCE.—In framing an indictment for larceny too great care cannot be taken to have the allegations as to the property stolen correspond with the proof. Thus an indictment charging the stealing of "one iron-gray horse, a gelding," is not supported by proof showing the theft of a "horse" or colt, the variance being fatal to conviction: *State v. McDonald*, 10 Mont. 21; 24 Am. St. Rep. 25, and note. See, also, *Jordt v. State*, 31 Tex. 571; 98 Am. Dec. 550; *Briscoe v. State*, 4 Tex. Ct. App. 219; 30 Am. Rep. 162. Proof of the taking of national banknotes will not support an allegation of the larceny of "lawful money of the United States": *Hamilton v. State*, 60 Ind. 193; 28 Am. Rep. 653.

BURGLARY—RECENT POSSESSION OF STOLEN GOODS AS EVIDENCE OF GUILT.—The late possession of stolen goods alone is not sufficient to sustain a verdict of guilt of larceny, but it is a circumstance tending to show guilt: *State v. Duncan*, 7 Wash. 336; 38 Am. St. Rep. 888, and note. To have such effect the possession must be personal, exclusive, unexplained, and must involve a distinct and conscious assertion of property by the accused: *Jackson v. State*, 28 Tex. App. 370; 19 Am. St. Rep. 839; *King v. State*, 99 Ga. 686; 59 Am. St. Rep. 251, and note.

BURGLARY—INDICTMENT—SUFFICIENCY OF.—An indictment stating an offense in the language of the statute creating it should be deemed sufficiently technical: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447; *Dickhaut v. State*, 85 Md. 451; 60 Am. St. Rep. 332, and note. It is the general rule that every essential factor necessary to constitute the crime of burglary ought to be averred: See monographic note to *People v. Richards*, 2 Am. St. Rep. 392, on burglary.

ST. LOUIS v. HEITZEBERG PACKING AND PROVISION COMPANY.

[141 MISSOURI, 375.]

NUISANCE—POWER OF MUNICIPALITY TO DECLARE.—General power given to a city to declare what are nuisances does not empower it to declare that a nuisance which is not so in fact.

NUISANCE.—SMOKE ALONE is not a nuisance under the common law, and when not declared to be such by statute, it cannot be deemed to be a nuisance until shown to be such by clear and convincing proof.

NUISANCE—MUNICIPAL ORDINANCE.—A city ordinance which makes no reasonable allowance for the regulation of "dense black" or "thick gray" smoke, but essays in advance of any known device for preventing it, to punish, as for a nuisance, all who produce it to any degree whatever, is unreasonable and void.

MUNICIPAL ORDINANCES TO BE VALID. must fix the duty or liability of the citizen by certain and intelligibly prescribed rules, so that he may govern himself accordingly; and if they leave the manner of their enforcement to unregulated official discretion they are void.

W. C. Marshall and E. McQuillin, for the appellant.

L. A. Steber and Alderson & McEntire, for the respondent.

379 GANTT, J. The city of St. Louis instituted this action against the defendant to recover a fine of fifty dollars for the violation of what is known as "the smoke ordinance." **380** That ordinance provides that "the emission into the open air of dense black or thick gray smoke within the corporate limits of the city of St. Louis" is thereby declared to be a nuisance, "and the owners, occupants, managers, or agents of any establishment, locomotives, or premises from which dense black or thick gray smoke is emitted or discharged are made guilty of a misdemeanor and subject to a fine of not less than ten nor more than fifty dollars. And each and every day wherein such smoke shall be emitted shall constitute a separate offense."

The statement of the city attorney averred that defendant had violated the above ordinance, in this, to wit: "In the city of St. Louis and the state of Missouri, on the fourth day of September, 1895, and on divers other days and times prior thereto, the said Edward Heitzeberg Packing & Provision Company (a corporation, Charles L. Heitzeberg, president), did then and there emit and discharge into the open air within the corporate limits of the city of St. Louis, Missouri, dense black and thick gray smoke from the smokestack or chimney of the building being numbered 3101 North Broadway, situated on west side of said street, in said city of St. Louis, Missouri, said Edward Heitzeberg Packing & Provision Company being the occupant of said building, contrary to the ordinance in such case made and provided."

Defendant filed a motion to dismiss, which was overruled, and on trial defendant was convicted as charged, October 30, 1895, and fined ten dollars. On the same day defendant perfected an appeal to the St. Louis court of criminal correction.

Defendant renewed its motion to dismiss in the court of criminal correction, which was overruled. It raised the following points: 1. The complaint does not state a cause of action against defendant; **381** 2. The smoke ordinance is unconstitutional and void; 3. The complaint is not responsive to the ordinances.

On December 28, 1895, the cause was submitted on an agreed statement of facts, in substance as follows: That defendant is a corporation, and is the owner or operates and controls a large manufacturing plant at No. 3101 North Broadway, corner of Branch street, in St. Louis, Missouri; that it owns, controls, and

operates a furnace in connection with said plant, wherein is burned or consumed large quantities daily of soft or bituminous coal; that there is a smokestack or chimney connected with said furnace, which is owned and operated by defendant; that said street, known as Broadway, on which the establishment fronts, is one of the principal thoroughfares of the city of St. Louis, and is located in a neighborhood in which there are numerous stores and dwellings and a large number of manufacturing establishments; that among the said manufacturing establishments, and most all of them using the same kind of coal, are the following [establishments enumerated].

That the court may take judicial notice of the size and commercial importance of the city of St. Louis; that said city is densely populated, containing nearly six hundred thousand inhabitants.

That on September 4, 1895, there was emitted and discharged into the open air within the corporate limits of said city from the stack or chimney of defendant's plant for thirty-nine and one-half minutes, dense black and thick gray smoke, arising from the use in the furnace of defendant corporation of common soft or bituminous coal as fuel, out of an observation of one hundred minutes, from 9:55 A. M. to 11:35 A. M., conducted by three smoke inspectors, to wit, Samuel R. Fox, August Knickmeir, and W. L. Scott, ³⁸² of which eighteen and one-half minutes of that time said stack discharged into the open air dense black smoke, so black and intense that it was opaque and could not be seen through; and of that time said stack discharged into the open air thick gray smoke for a period of twenty-one minutes, smoke that was heavy and dense, but not perfectly black; that said dense black and thick gray smoke, so emitted and discharged as aforesaid, was carried for a distance of several blocks before it became very much dissipated, that is, before it became very much scattered and diffused into the air within the corporate limits of said city.

That William B. Potter would testify that he is an engineer, and at present manager and chief engineer of the St. Louis Sampling & Testing Works, and is also chairman of the smoke commission of the city of St. Louis; that for a period of eight or ten years he had made a special study of the problem of smoke abatement, with special reference to the conditions of the plants and establishments of the city of St. Louis; that during said period he has tested and reported on the varying degrees of efficiency of numerous devices designed for the abatement

of smoke where large quantities of common soft or bituminous coal is used as fuel; that in his opinion, as a result of long study, experience, and observation in the city of St. Louis, it is entirely practicable to abate smoke, or, rather, reduce it below the terms of dense black or thick gray, as used in city ordinance No. 17049, and at the same time use soft or bituminous coal in great quantities; that it is entirely practicable to so reduce the smoke in the various plants and establishments in the city of St. Louis that dense black or thick gray smoke would not be emitted or discharged into the open air; that this reduction or abatement of the smoke can be accomplished without injury to the boiler plants, and without any ³⁸³ unreasonable requirements as to skill or amount of labor on the part of those in charge of or of those operating the boilers. That dense black or thick gray smoke of the character above described as having been emitted and discharged into the open air within the corporate limits of the city of St. Louis, from the smokestack or chimney of defendant's plant, would be damaging and detrimental to certain classes of property, and would cause inconvenience and annoyance to persons within said city. That said smoke ordinance No. 17049 is in existence and in force within said city.

No further evidence being offered, at defendant's request, the court declared the law to be that under the law and the evidence plaintiff could not recover. (The city excepted to the declaration of law.) Thereupon the court found a verdict and judgment for defendant and ordered a discharge. In due time the city filed its motion for a new trial, which was overruled, and, after perfecting its bill of exceptions, sued out a writ of error from this court.

1. By its charter (2 Rev. Stats. 1889, sec. 26, p. 2098, clause 6) the city of St. Louis is authorized "to declare, prevent, and abate nuisances on public or private property, and the causes thereof."

It will be observed that it is not specifically empowered to declare the emission of thick smoke within the city limits to be a nuisance per se. Notwithstanding the broad terms in which the power is given to declare nuisances, it is not competent for the city to declare that a nuisance which is not so in fact. We take it that the line of demarcation is quite plain under a municipal grant like this. As was said in *Lake View v. Letz*, 44 Ill. 81, and quoted with approval by Judge Scholfeld in *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, "there are some things which ³⁸⁴ in their nature are nuisances and

which the law recognizes as such; there are others which may or may not be so, their character, in this respect, depending on circumstances. In the latter instance, it is manifestly beyond the power of the municipality to declare in advance that those things are a nuisance."

Judge Dillon, in his work on Municipal Corporations, discussing this power of municipal corporations to declare and abate nuisances, says: "Such powers, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use is not such": Dillon on Municipal Corporations, 4th ed., secs. 95, 374.

This court, in *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6, announced a safe and conservative rule on this subject. Said the court: "We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not": Citing *Yates v. Milwaukee*, 10 Wall. 497, in which the supreme court of the United States, through Mr. Justice Miller, said: "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character."

Now smoke alone was not a nuisance per se at common law, nor has it been declared to be such by any statute of this state. The legislature has defined what shall constitute a nuisance in this state by a general enactment in these words: "Every person who shall erect or maintain any public nuisance . . . to the annoyance or injury of any portion of the inhabitants ³⁸⁵ of this state, shall be deemed guilty of a misdemeanor": 1 Rev. Stats. 1889, sec. 3851.

Numerous cases may be found collected by the author in 1 Wood on Nuisances, third edition, section 505, and notes, which hold that smoke alone may constitute a private nuisance, but, in order to have that effect, it must either produce a tangible injury to property, as by the discoloration of buildings, injury to vegetation, discoloration of furniture or clothing or merchandise, or some tangible injury to property, real or personal, or sensibly impair its comfortable enjoyment, but in all of these cases it is a question of fact depending on the character of the

smoke, the quantity, the location, and circumstances: *St. Paul v. Gilfillan*, 36 Minn. 298; *Sigler v. Cleveland*, 3 Ohio N. P. 119.

None of the authorities cited by the learned counsel for the city state the law otherwise save the decision in *Marshall v. Chicago*, 44 Ill. App. 410. That was a prosecution under the smoke ordinance of Chicago, and the defendants requested the trial court to give the following instruction: "The jury are instructed that it is the duty of the city to prove that, among other things, the smoke that issued from the chimney of defendants at the time complained of was not only dense, but was at that particular time of a nature detrimental to the property which was close enough in proximity to be affected by it injuriously or was of a nature to be personally annoying to the public at large, and unless the jury believe from the evidence that the smoke complained of was at the particular time in question dense and also proved to be detrimental to property within the city of Chicago or was of a nature to be personally annoying to the public at large, then your verdict must be for defendants." Concerning the propriety of refusing this instruction, the court said: "The last half of it, as to what the jury ³⁸⁶ should believe in order to convict, was perhaps proper; but the first half, requiring the city to prove what may be presumed without proof, was not. It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago that no jury could be without it." That case is the only one which holds that smoke is a nuisance per se; that it is unnecessary to prove that any annoyance followed its emission or that it was detrimental to any property. The supreme court of Illinois, in *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, expressly declined to say whether the mere emission of dense smoke in the city of Chicago, without proof that it was a nuisance in fact, was a nuisance per se.

On the other hand, the supreme court of Minnesota, in *St. Paul v. Gilfillan*, 36 Minn. 298, held that "the emission of dense smoke from smokestacks or chimneys is not necessarily a public nuisance; whether so or not would depend largely upon the locality and surroundings." In that case, the ordinance was held void because no provision was made for a determination of the question upon the facts of any particular case, and for

the reason that the city had no power to pass such an ordinance.

The smoke ordinance of the city of Detroit was upheld by the supreme court of Michigan in *People v. Lewis*, 86 Mich. 273, but that ordinance was radically different from the St. Louis ordinance in that it only made the emission of "dense smoke or smoke containing soot, which should damage the property or injure the health of any person or should especially annoy the public," an offense. It is unnecessary to add that the Detroit ordinance defines a nuisance as at common law.

³⁸⁷ In *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, the admission that "the smoke emitted was detrimental to property and a personal annoyance to the public" was made the basis of the decision for whatever views the court may have entertained on the question before us. The British act of Parliament, 29 & 30 Victoria, chapter 90, section 19, enacts that the word "nuisance" shall include "every chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance." It is obvious from its terms that it depended in each case whether the smoke was emitted in such quantity as to be a nuisance within the meaning of the English law. No one, we suppose, will doubt that dense smoke may be emitted in such quantities as to become an intolerable nuisance, both to the public and individuals, but the question before us is the power of the city under its charter to declare every emission of black, dense smoke, or thick gray smoke, a nuisance, irrespective of the length of time it is emitted, or whether it is in fact a nuisance without providing for any inquiry as to these facts. In a word, is such an ordinance not so unreasonable that the courts should declare it void for that reason? Now, it was admitted at the bar of this court, by the learned special counsel who argued the case for the city, that the emission of "dense black" or "thick gray" smoke for one or two minutes constitutes an offense under this ordinance, and yet he admitted that up to this time no device or means was known or had been invented whereby such smoke could, under all circumstances, be suppressed or prevented; that in the first starting of a fire, before the coal or wood was thoroughly ignited, dense smoke would necessarily be emitted, but he avoided this objection to the ordinance by claiming that the inspectors employed to detect violations of the ordinance exercise a wise discretion in such cases and ³⁸⁸ do not attempt to prosecute every emission of "dense black" or "thick gray" smoke.

Now the ordinance itself would punish every housekeeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centers or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, and it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance which makes no reasonable allowance for the regulation of this smoke, but essays in advance of any known device for preventing it to punish all who produce it to any degree whatever, is wholly unreasonable. On the other hand, if, as learned counsel suggests, the ordinance is not enforced in all its strictness, but much is left to the discretion of the inspectors, then we have an unregulated official discretion which of itself renders the ordinance void, for it cannot be tolerated that the rights of a citizen in this state shall depend entirely upon the caprice of any official, high or low. All valid ordinances must fix the duty or liability of the citizen by certain intelligible prescribed rules so that he may govern himself accordingly.

Our conclusion is, that while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health or annoying to the public at large, this ordinance must be held void because it exceeds ³⁸⁹ the powers of the city under its charter to declare and abate nuisances and is wholly unreasonable.

The judgment of the St. Louis court of criminal correction is affirmed.

Barclay, C. J., concurs in the result.

Sherwood, Macfarlane, Burgess, Robinson, and Brace, JJ., concur.

MUNICIPAL CORPORATIONS—POWER TO DECLARE WHAT IS NUISANCE.—A municipal corporation has no power to declare a particular use of property a nuisance, unless such use comes within the common-law or statutory idea of a nuisance, though its charter purports to confer upon it power to prevent and restrain nuisances and to declare what shall constitute a nuisance: *Grossman v. Oakland*, 30 Or. 478; 60 Am. St. Rep. 832, and note; *Walker*

v. Jameson, 140 Ind. 591; 49 Am. St. Rep. 222, and note; note to Mayor v. Mulligan, 51 Am. St. Rep. 88, 89.

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY.—By-laws passed under the incidental powers of a municipality are required to be fair, reasonable, and impartial in their operation. To be reasonable an ordinance should be certain—certain in its definition of the offense, and certain in the penalty inflicted by it: See monographic note to Robinson v. Mayor, 34 Am. Dec. 633, 635; Anderson v. Wellington, 40 Kan. 173; 10 Am. St. Rep. 175. Thus, an ordinance is invalid which specifies an offense and the penalty therefor, but is so uncertain in its terms as to supply no test by which the average man may know when he is committing the offense or incurring the penalty: State v. Clarke, 69 Conn. 371; 61 Am. St. Rep. 45, and note.

HOLKER v. HENNESSEY.

[111 MISSOURI, 5:7.]

GARNISHMENT—PLEADINGS IN.—Issues in garnishment proceedings are made up by the denial of the answer of the garnishee and the reply thereto. The denial should state the grounds upon which a recovery is claimed, and the reply to the denial makes the issue.

APPELLATE PRACTICE—AMOUNT IN DISPUTE.—The amount in dispute on the appeal of plaintiff is the difference between the amount claimed and the amount recovered.

APPELLATE PRACTICE—FINDINGS, WHEN NOT DISTURBED.—If the evidence is conflicting, and no instructions are asked or given, the findings of the trial court sitting without a jury are not to be disturbed on appeal.

PROCESS—SERVICE OF—SETTING ASIDE.—In a civil action, service of process upon a defendant who is brought into the territorial jurisdiction of the court by fraudulent means or criminal process may be set aside, if timely objection is made thereto.

PROCESS—SERVICE OF BY UNLAWFUL MEANS.—If an officer gets possession of a debtor's property, as by breaking into his dwelling-house without proper authority, and then attaches it on mesne process, or levies upon it on execution, the attachment or levy is void.

CRIMINAL LAW—RIGHT TO TAKE PROPERTY FROM PRISONER.—In the absence of statute, an officer has no right to take any property from the person of the prisoner, except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape, and for these purposes he may search the prisoner, but he holds all property thus taken, whether goods or money, subject to the order of the court.

CRIMINAL LAW—RIGHT TO SEARCH PRISONER.—An arresting officer has a right to search the prisoner. This power exists from the nature and objects of the public duty the officer is required to perform.

CRIMINAL LAW—TITLE TO PROPERTY TAKEN FROM PRISONER.—Neither an arresting officer nor the state acquires any title to property taken from a prisoner, or lien thereon, until after

conviction. A mere accusation does not justify the confiscation of the property of the prisoner.

ATTACHMENT—PROPERTY TAKEN FROM PRISONER. Property not stolen, but wrongfully taken from the custody of a prisoner by an arresting officer, must be regarded as being in the custody of the prisoner prior to his conviction, and is not subject to levy under attachment or execution, and, if rightfully and lawfully taken, it must be regarded as in the custody of the law and subject to the order of the court prior to the conviction of the prisoner, and is not subject to levy under execution, attachment, or garnishment.

GARNISHMENT—PROPERTY OF PRISONER.—Money or property of a prisoner, lawfully taken from him at the time of his arrest, may be applied to the satisfaction of the judgment against him on the criminal charge, if execution has issued, and, if not so applied before the return of the execution, it must be returned to the prisoner, and is subject to garnishment in the hands of the officer.

PROPERTY OF PRISONER—LIABILITY TO PROCESS.—After final conviction in a criminal case, the purpose of the legal custody of money or property taken from the person of the prisoner has presumably been accomplished, and it becomes liable to execution, attachment, or garnishment, unless the court shall otherwise direct.

LIENS—PRIORITY OF ON STOLEN PROPERTY.—Under a statute providing for the restoration of stolen property, and that "the party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state," the lien of the injured party can only be enforced after conviction of the criminal, though it dates from the arrest, while the lien of the state, though it dates only from conviction, takes precedence over that of the injured party.

F. Griffin and W. W. Ramsay, for the appellant.

E. A. Vinsonhaler, for the respondent.

530 **MACFARLANE, J.** The suit is against Hennessey and Green to recover \$5,000, of which amount plaintiff charges that defendant robbed him. In aid of the suit an attachment issued and was placed in the hands of the coroner, and defendant Pixler, sheriff of Nodaway county, was summoned as garnishee.

Garnishee made answer to the usual interrogatories as follows: "That at the date of service of process of garnishment, he did not have, nor has he since received, any ⁵³¹ property, effects, or credits belonging to any of defendants; unless the following statement of facts should be held to show property in his hands belonging to defendants: That on the . . . day of . . . 1894, two persons, who gave their names as David C. Wilson and E. M. Hall, were apprehended by the police officers of Nebraska City, Otoe county, Nebraska, upon a charge that they had committed grand larceny in Nodaway county, Mis-

souri. Garnishee was informed by the officers that upon such arrest said officers took from the person of David C. Wilson \$180, and from the person of E. M. Hall \$66. That pending issuance by the governor of the state of Nebraska of a warrant upon the requisition of the governor of the state of Missouri, said Wilson and Hall sued out a writ of habeas corpus to secure their release; that garnishee, to secure the detention of said parties, employed counsel and guards, and the said parties having been denied their release by the court, garnishee paid the costs; that the following expenses were incurred." Here follows an itemized statement of the expenses of habeas corpus proceedings in Nebraska, amounting to \$411.75.

Garnishee continues: "That afterward these parties, under warrant from governor of the state of Nebraska, were returned to and confined in the jail of Nodaway county—D. C. Wilson, 54 days, at a cost of \$27; E. M. Hall, 61 days, at a cost of \$30.50—when they gave bond for their appearance on the first day of November term, 1894, to answer an indictment now on file in this court; that said parties failed to appear as required, and their bonds were forfeited and alias warrants issued for their arrest; that they are now fugitives from justice; that the sum of money said to be taken from the persons of said Wilson and Hall, by the police officers aforesaid, were turned over to this garnishee, and he is entitled to the same to reimburse ⁵³² him and the state for the expense so incurred; that said Wilson and Hall are not entitled thereto. Garnishee further states that he is not indebted in any manner to said Wilson and Hall. Having fully answered, garnishee asks to be discharged with costs."

To this answer plaintiff replied: "That these defendants were, on or about the thirteenth day of June, 1894, justly indebted to him in the sum of \$5,233 1-3, for and on account of having, at the county of Nodaway, and state of Missouri, on the thirteenth day of June, 1894, feloniously stolen said sum of money from him and having received the same from him by means of false pretenses; that on account of said felony the said Ed. Hennessey, alias E. M. Hall, and the said John Green, alias David C. Wilson, were at the June term, 1894, of the Nodaway county circuit court, indicted. That afterward, to wit, on the . . . day . . . 1894, the garnishee, Benjamin F. Pixler, arrested said Green, alias Wilson, and said Hennessey, alias Hall, and placed them under arrest for the commission of said felony, and after said arrest he received from said parties the sum of \$246 in money; one diamond pin of the value of \$100; one gold watch

of the value of \$150; one revolver of the value of \$10; one valise of the value of \$5; a roll of money of the value of \$1,200, of the goods, chattels, and property of the said Ed. Hennessey, alias E. M. Hall, John Green, alias D. C. Wilson, Mary Green, Mathew Reynolds, and William Gardner, alias John L. Gardner, alias Denver. That all of said property was in the possession of the garnishee at the time of the service of this summons on the said Benjamin F. Pixler. Plaintiff further states that though the said Hennessey, alias Hall, and the said Green, alias ⁵³³ Wilson, were indicted for said offense aforesaid, and were arrested as aforesaid, they were afterward, during the month of September, 1894, released from the Nodaway county jail, by the garnishee herein, Benjamin F. Pixler, and they have since escaped from this state, and have not been brought to trial or convicted of said offense. Plaintiff further says that from the date of the arrest of said parties as aforesaid this plaintiff had a just and lawful lien on the property aforesaid, so received by this garnishee for the reparation and payment of his debt against these defendants. That all of said property was and is subject to the garnishment proceedings in this case, and is in nowise liable to the payment of the claims set forth in the answer of garnishee. Wherefore plaintiff asks judgment against the garnishee for the full value of said property aforesaid."

There seems to be no denial of this reply, although the case was tried without objection on the part of plaintiff. No objection is now made to this omission, and we treat the case, as treated by the parties, as though a general denial had been filed.

The issues were tried to the court without a jury. On the trial, it was shown that plaintiff had recovered judgment against defendants for over \$5,000; that garnishee was sheriff of Nodaway county; that under a charge of grand larceny from plaintiff, defendants were arrested in Nebraska by garnishee and the local officers of that state, and two revolvers, two valises, and a sum of money was taken from them; that defendants attempted but failed to secure their release under writs of habeas corpus; that garnishee paid the expenses incident to the arrest, defending the habeas corpus proceedings and securing the extradition of the prisoners which amounted to the sum named in the answer of garnishee; that the prisoners were brought to this state and indicted, ⁵³⁴ that they afterward gave bail and never appeared to answer to the indictment and their recognizance was forfeited by judgment of court and the accused were still fugi-

tives from justice. There was evidence of one witness who testified that garnishee told him, while in Nebraska, that he had taken \$4,000 from defendants. Garnishee admitted that the officers making the arrest took from the prisoners \$246 in money, two revolvers, and two valises. He claimed that one of the revolvers was given to him by the prisoners. He admitted that he had the other and the \$246 in money still in his possession, but claimed that it was subject to the state's lien for payment of costs. The evidence showed that plaintiff furnished garnishee money to pay the costs incurred in making the arrest, and in all other proceedings in securing the return of the prisoners to this state. There was evidence tending to prove that Judge Dawson received a gold watch and a diamond pin as security for his fee of \$300 for legal services in defending the prisoners; that \$200 was afterward paid; the diamond pin, valued at \$150, was delivered to garnishee to be held as security for the balance; that after forfeiture garnishee paid Judge Dawson the balance of his fee and retained the pin. Judge Dawson testified that he received the watch and pin from a woman claiming to be the wife of defendant Green.

The finding and judgment of the court is as follows: "The court finds that the defendant has in his possession a revolver worth \$15. Ordered that the garnishee deliver the same into court, and upon said delivery is entitled to his discharge; and the court finds for garnishee as to other matters claimed, and now the sheriff, Pixler, delivers to the clerk of this court the revolver claimed, and is discharged."

From the judgment plaintiff appealed to the Kansas ⁵³⁵ City court of appeals, from which it was transferred to this court on account of the amount involved, being in excess of the jurisdiction of that court.

1. Issues in garnishment proceedings are made up by the denial of the answer of the garnishee and the reply thereto. The denial should state the grounds upon which a recovery is claimed and a reply to the denial makes the issue. The reply of plaintiff in this case charged that the garnishee received from the defendants, when arrested, the sum of \$246 in money; one diamond pin of the value of \$100; one gold watch of the value of \$150; one revolver of the value of \$10; one valise of the value of \$5; and a roll of money of the value of \$4,200, the property of said defendants. The evidence tended to prove these allegations. The amount in dispute, therefore, exceeded \$2,500. The court found that the garnishee had in his pos-

session one revolver, the property of the defendants, of the value of \$15, which was ordered to be deposited in court. The amount in dispute, on the appeal of plaintiff, is the difference between the amount claimed and the amount recovered. In this case the supreme court clearly has jurisdiction of the appeal: *Dowd v. Westinghouse Air Brake Co.*, 57 Mo. App. 219; 132 Mo. 579.

2. As to whether or not the diamond pin and watch in question were the property of defendants, the evidence is conflicting. No instructions as to them were asked or given, so we are unable to determine the theory upon which that issue was tried and determined. Indulging the presumption that the court found and decided correctly, we assume that it found that these articles belonged to the woman from whom Judge Dawson received them. The evidence is also conflicting as to the amount of money the garnishee took from defendants. No instructions were asked or given on this question, either. No question of law, therefore, was ⁵³⁶ raised on that fact and there is nothing before us to decide.

Garnishee admitted, however, on the trial, that he took from the persons of defendants, when he arrested them, \$246, which he still had. This fact then must be taken as confessed. The exception taken in the trial court, and insisted on here, is that error was committed in holding that "the \$246 in the possession of the garnishee was not subject to garnishment."

3. The only question raised by this record is, whether or not this money taken from the person of these prisoners when arrested, and still held by garnishee officially as sheriff, is subject to garnishment, in an attachment suit in favor of plaintiff and against defendants, the subject of the suit being damages on account of the alleged crime.

It has been held in this state, and is generally recognized as the law, that in a civil action, service of process upon a defendant, who is brought into the territorial jurisdiction of the court by fraudulent means or criminal process, will be set aside if timely objection is made thereto: *Byler v. Jones*, 79 Mo. 261; *Christian v. Williams*, 111 Mo. 435, and cases cited. So it is held that "where an officer unlawfully gets possession of a debtor's property, as by breaking into his dwelling-house without proper authority, and then attaches it on mesne process, or levies upon it on execution, the attachment or levy will be void": *Closson v. Morrison*, 47 N. H. 485; 93 Am. Dec. 459; citing, *Ilsley v. Nichols*, 12 Pick, 270; 22 Am. Dec. 425; *People v. Hub-*

bard, 24 Wend. 369; 35 Am. Dec. 628; Curtis v. Hubbard, 4 Hill, 437; 40 Am. Dec. 292, and other cases. This seems to be the modern doctrine founded upon the principle that courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors, though the old doctrine was that the seizure under process in such case would be valid, while the officer making it would ⁵³⁷ be liable for the trespass: See People v. Hubbard, 24 Wend. 369; 35 Am. Dec. 628.

In the case of Closson v. Morrison, 47 N. H. 485, 93 Am. Dec. 459, the sheriff arrested a person upon a charge of grand larceny, and, before trial or examination, proceeded, on his own motion, to search the prisoner, and took from his person some money, a watch, a watch chain, and a wallet. On the next day writs of attachment were issued against the prisoner and placed in the hands of the sheriff, and he thereupon attached the money and other property. The court, in giving its judgment, says: "The money and other articles were proper articles to attach, if the officer could rightfully obtain possession of them, without arresting the debtor, which his writ did not warrant him in doing. Now, if the officer took advantage of his warrant, and the arrest under it, to take from his prisoner this property, not for any legitimate purpose, but simply for the purpose of attaching it on these writs, that would be obtaining possession of the property under false pretenses and fraudulently, which would make the possession to stand like the unlawful possession in case of breaking into the house in the other case, and would not justify the attachment." The court held that if this property was lawfully taken from the person of the debtor, it was subject to attachment while in the hands of the sheriff.

The same ruling was made by the supreme court of Iowa in the case of Reifsnnyder v. Lee, 44 Iowa, 102; 24 Am. Rep. 733. Beck, J., in delivering the opinion, says: "A party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases, parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence, or abuse of ⁵³⁸ legal process." Money and a watch had also been taken from the person of the prisoner in that case, and the court held that the officer was authorized to make the search and take into his possession such property, and the levy of the attachment upon it while so held was valid. In a subsequent case, however, the

same court held that where the sheriff took from the person of a prisoner two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them his possession was that of the prisoner, and they were "no more liable to attachment in an action against the prisoner than if they had been in his pocket." The court says: "To hold otherwise would lead to unlawful and forcible searches of person under cover of criminal process as an aid to civil actions for the collection of debts": *Commercial Exchange Bank v. McLeod*, 65 Iowa, 666; 54 Am. Rep. 36.

We find the same ruling by the supreme judicial court of Massachusetts, in the cases of *Robinson v. Howard*, 7 Cush. 257, and *Morris v. Penniman*, 14 Gray, 220; 74 Am. Dec. 675. In the former case, the headnote reads: "An officer is not liable, by the trustee process, to a creditor of a person arrested by him on a criminal warrant, for money or other property taken by the officer under color of official duty from the person of his prisoner, and for which he gives the latter a receipt." Shaw, C. J., says: "Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable under trustee process." In the latter case, one Bassett was arrested on a charge of larceny. On being asked what property he had about him, he delivered up, without objection, a watch and key. While ⁵³⁹ they were in possession of the officer they were attached on process against Bassett. On this state of facts the court held that "the attachment of the watch and key was not valid."

A sheriff in Texas took from the person of a prisoner \$950 in money, and other property. While in his possession the officer was served with process by garnishment. Knox, the prisoner, intervened and claimed that the property in the hands of the sheriff was in the custody of the law, and was not subject to garnishment at the suit of a creditor. On appeal, this plea was sustained, on the ground that the property was not subject to process by garnishment: *Richardson v. Anderson* (Tex. App., Jan. 20, 1892), 18 S. W. Rep. 195.

The supreme court of Alabama reaches a different conclusion under a provision of the code of that state. The court, however, in discussing the question, says: "At common law, and perhaps without statute, the money or property" taken from the

person of the prisoner "would be in gremio legis, not subject to attachment, and entirely under the control of the court": *Ex parte Hurn*, 92 Ala. 109; 25 Am. St. Rep. 23.

Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape. The officer has the undoubted right to make the search, and considering the nature of the accusation he may, when acting in good faith, take into his possession any articles he may suppose will aid in securing the conviction of the prisoner or will prevent escape. "He holds all, whether money or goods, subject to the order of the court, which, in proper circumstances, will direct him to restore the whole or a part to the prisoner": Bishop's ⁵⁴⁰ *Criminal Procedure*, secs. 211, 212; Wharton's *Criminal Pleading and Practice*, secs. 60, 61.

We find no statute of this state giving the arresting officer authority to search a prisoner, but no statute is necessary. The power exists from the nature and objects of the public duty the officer is required to perform. Such authority is directly given to a committing magistrate by statute (Rev. Stats. 1889, sec. 4308), but unless the arresting officer has the authority immediately, on making the arrest, all evidence of crime and of identification of the criminal might be destroyed before the prisoner could be taken before the magistrate.

We have no doubt the search of the prisoners in this case was entirely justifiable, considering the nature of the crime charged and other circumstances. In the circumstances, also, he was justified in taking from their persons and keeping in his possession the money found upon them, though it may have been in no manner connected with the charge or proof against them. Money is the most effective kind of property a prisoner could have in his possession to be used as a means of escape, and the safekeeping of the prisoner justified the retention of the money, at least until he was brought before the magistrate. Neither the officer or the state acquires any title to the property, or lien upon, until after conviction. A mere accusation does not justify the confiscation of the property of the accused.

The property, therefore, whatever its character, belongs to the prisoner until judicially sequestered. "The officer," says Bishop, "holds all, whether money or goods, subject to the order of court, which, in proper circumstances, will direct him

to restore the whole or a part to the prisoner. This power is exercised both where the original taking was wrongful, and where for any other reason there ought to be a partial or ⁵⁴¹ complete returning of the thing": Bishop's Criminal Procedure, sec. 212.

If the taking was wrongful, then the custody of the officer can only be regarded as the custody of the prisoner, and the property in his hands would, before conviction, no more be subject to levy under attachment or execution than if upon the person of the owner. To hold otherwise, as said by Shaw, C. J., *supra*, "such process might be used to search his person, or otherwise, under color of lawful authority, get possession of the property of the debtor, in order to place it in the hands of the officer, and thus make it attachable." No such abuse of criminal process should be allowed. "The people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures": Const., art. 2, sec. 11.

If the property was lawfully taken from the person of the prisoner, the act of the officer will be in the performance of an official duty. The sheriff being an officer of the court in which the indictment is pending, the money is in custody of the court subject to its order. The rule of general application is, that money or property which has come into the hands of an officer of a court by virtue of legal process is regarded as in the custody of the law, and cannot be taken from him under other process, either of execution, attachment, or garnishment: Shinn on Attachment, sec. 505; 2 Wade on Attachment, secs. 330, 421; Kneel on Attachment, sec. 410; Waples on Attachment, sec. 390; 8 Am. & Eng. Ency. of Law, 1137. This rule was approved at an early day by this court in *Marvin v. Hawley*, 9 Mo. (379) 382, 43 Am. Dec. 547, in which the court says: "It is not the policy of the law thus to embarrass the regular proceedings of the courts, deprive parties of their rights, and impose such onerous and difficult duties on the sheriff. We are, then, of the opinion that money in the hands of the ⁵⁴² sheriff, collected on execution, cannot be attached by the creditor of the execution plaintiff before the return day of the writ."

The officer, in such case, is the mere agent of the court and custodian of the property, and to permit an interference with his possession would be to interfere with the jurisdiction of the court, and divert the property from the purposes for which it is held. No one could reasonably claim that money or other property taken from the person of a prisoner, and held to be used as

evidence of the criminal charge, could be taken out of his possession by other legal process, whether of the same court or another, at least until final judgment of conviction. "For these reasons, and because it is deemed contrary to public policy to permit such officers to be subjected to the embarrassment, delay, and expense incident to such process, the authorities are almost uniform in holding that general words in garnishment statutes are not to be construed as including them": 8 Am. & Eng. Ency. of Law, 1138, and note 2.

The statute of Missouri provides that "no sheriff, constable, or other officer charged with the collection of money shall, prior to the return day of an execution or other process upon which the same may be made, be liable to be summoned as garnishee": Rev. Stats. 1889, sec. 5220. It may be agreed that this statute does not in terms apply to a case like this one, in which the property is taken from the owner under criminal process. But we do not think the statute, by stating one case of exemption, excludes all others. The sheriff does not require an order of court to pay over money collected on execution; the law imposes that duty upon him. The statute was designed to protect the sheriff from embarrassments in executing the process of the court and the onerous and difficult duties garnishment proceedings would impose upon him. The principle ⁵⁴³ that money in the hands of a custodian of the court is subject to its order rests upon wholly different grounds, as has been seen, and applies as well to receivers, clerks, and other custodians: Shinn on Attachment, sec. 505; 8 Am. & Eng. Ency. of Law, 1138.

It is therefore our opinion that if the money and property were taken from the person of the prisoners by authority of law, which the sheriff would be estopped to deny, it was in the custody of the law and subject to the orders of the court in which the criminal proceedings were pending, and was not, at least until after conviction, subject to attachment at a suit of a creditor of the prisoner. If, on the other hand, it was taken without authority of law, then it is not subject to attachment because a wrongful use was made of criminal process in getting possession. Such an abuse of criminal process is against the policy of the law, and would be violative of one of the rights guaranteed by the constitution.

The only case in this state we have been able to find having any bearing on the issues in this one is McKnight v. Spain, 13 Mo. 536. In that case money and a watch were taken from a prisoner on his arrest, which were held by the officer

of the court until after trial and conviction of the prisoner, and a judgment for costs had been rendered against him. An execution was issued on the judgment and the property so held by the officer was sold and the proceeds were applied to the payment of costs. The only questions determined in that case was whether the execution was sufficient in form and whether or not the lien of the state, which under the statute then in force dated from the arrest, would have priority over a transfer of the property after arrest and before judgment. The court held the execution good and that the lien of the state prevailed over the assignment. It does appear, however, that ⁵⁴⁴ the property was sold under execution, though held by an officer of the court, and the validity of the sale was tacitly approved.

This circumstance give some support to the position of plaintiff that the property, while in the hands of the officer, was subject to seizure and sale under civil process. The statute makes it the duty of the clerks of criminal courts at the end of each term to issue executions for all fines imposed and all costs of conviction in criminal cases remaining unpaid "which shall be executed in the same manner as executions in civil cases": Rev. Stats. 1889, sec. 4265. We take the issuance of execution in such cases and the duty under it of the officer into whose hands it is placed, done and required by authority of law, as equivalent to an order of the court, and, unless otherwise directed by the court, authorizes the money or property in the custody of the court to be applied to the satisfaction of the judgment.

When the purpose of the legal custody has been accomplished, and the only duty the custodian has to perform is to deliver the property or pay the money to the owner, the legal custody ceases, the officer holds it for the owner, and it becomes subject to process at the suit of his creditors: 2 Shinn on Attachment, sec. 546. This rule is recognized by our statute, which exempts a sheriff from garnishment until the return day of an execution, and an administrator until an order of distribution be made.

After a final conviction in a criminal case, the purpose of the legal custody of the money or property taken from the person of the prisoner has presumably been accomplished, and it becomes subject to process unless the court may otherwise direct.

What has been said has no application to property stolen

or otherwise feloniously obtained. The statute ⁵⁴⁵ provides for the restoration of such property to the owner: Rev. Stats. 1889, secs. 4308 et seq.

4. Plaintiff places his chief reliance for reversal upon the last clause of section 4317, which provides that "the party injured shall have a lien on the estate of the criminal from the time of his arrest subject to any lien granted by law to the state."

We are unable to see that this provision authorizes the enforcement of the lien by garnishment. Indeed, the lien of the injured party is expressly made subject to the lien of the state, and the equities between the two lienors, in case they are conflicting, must be determined and settled by the court having custody of the property, under such appropriate proceedings as will give each a chance to be heard. The statute gives the state a lien on all property, real and personal, of any person charged with a criminal offense, from the time of his final conviction of such offense, for the payment of all fines and costs which he may be adjudged to pay: Rev. Stats. 1889, sec. 4264. The statute further provides: "Whenever any person shall be convicted of any crime or misdemeanor, he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county": Rev. Stats. 1889, sec. 4395.

The lien the statute gives to the injured party only becomes consummate and enforceable on final conviction, but then relates back to the date of arrest. The preceding part of section 4317, which provides the proceedings by which the person injured may secure restitution, or reparation in damages, shows clearly that the lien can only be enforced after final conviction. The lien is given on the estate of the criminal, and no one can justly be called a criminal until he be convicted of crime. While, therefore, the lien of the state dates only from conviction, and the lien of the injured person ⁵⁴⁶ dates from the arrest, both become enforceable on the date of the conviction, and the lien of the state has precedence, though of a later date.

In this case, neither party had an enforceable lien on the property in question by virtue of the foregoing provisions of the statute, for there had been no conviction, and the statute gave no aid to the proceedings by attachment.

We are of the opinion that the circuit court ruled correctly in holding that the sheriff was not subject to garnishment on account of the money of the prisoner in his custody, and its judgment is affirmed.

All the judges of this division concur.

APPEAL—AMOUNT INVOLVED.—The “amount in dispute” is the difference between the amount of the judgment and the sum claimed by the complaint, where the appeal is by the plaintiff from a judgment in his favor: *Skillman v. Lachman*, 23 Cal. 198; 83 Am. Dec. 96, and note.

APPEAL—REVIEW OF FINDINGS MADE BY COURT WITHOUT JURY.—The judgment of a court upon facts will not be revised where the judge is substituted by consent of the parties in lieu of a jury; if evidence be conflicting and he decides against the weight of testimony, or if it would have justified an inference of fact which the court refused to draw, the appellate court will not reverse his judgment merely because it could, or might have, come to a different conclusion of fact: *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223; *Tinges v. Moale*, 25 Md. 480; 90 Am. Dec. 73. Findings made by the court in such a case have the force and effect of a verdict of the jury: *Swayne v. Waldo*, 73 Iowa, 749; 5 Am. St. Rep. 712.

PROCESS—ILLEGAL SERVICE—SETTING ASIDE.—A party decoyed from another state or county on a promise not to sue him may, upon being sued in violation of the promise, avoid the process: *Steele v. Bates*, 2 Aikens, 338; 16 Am. Dec. 720. Arresting a defendant on criminal process to bring him within the jurisdiction of the court for the purpose of commencing a civil action against him is also an abuse of process, and on motion the proceedings will be set aside: *Note to Steele v. Bates*, 16 Am. Dec. 725.

ARREST—RIGHT OF OFFICER TO SEARCH PRISONER.—The search of a prisoner arrested is justifiable only as an incident to a lawful arrest; if the arrest is unlawful, the search is unlawful, and is aggravated by the illegality of the arrest: *Cunningham v. Baker*, 104 Ala. 160; 53 Am. St. Rep. 27. A person while in custody on a criminal charge may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality: *Rusher v. State*, 94 Ga. 363; 47 Am. St. Rep. 175, and note. See *Pickett v. State*, 99 Ga. 12; 59 Am. St. Rep. 226, and note.

ATTACHMENT—PROPERTY TAKEN FROM PRISONER—CUSTODY OF LAW.—Money taken from the person of a prisoner at the time of his arrest by the officer, acting in good faith, under the belief, or reasonable and probable ground for the belief, that it is connected with the crime charged, or that it may be useful as evidence at the trial, is subject to attachment or garnishment while in the officer's hands or in court. If the arrest is not made in good faith, or if the money is not seized under probable ground for the belief mentioned, it is not subject to attachment or garnishment; or if the levy is procured by trickery or fraud on the part of the attaching creditor, it is invalid, and such creditor, as well as the officer making the levy with knowledge of the fraud, is liable in damages: *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23, and note. Compare *Hill v. Hatch*, 99 Tenn. 39; 63 Am. St. Rep. 822, and note.

AMERICAN BREWING ASSOCIATION v. TALBOT.

[141 MISSOURI, 674.]

WAREHOUSEMEN—LIABILITY FOR LOSS BY ACT OF GOD—NEGLIGENCE.—A warehouseman, whose warehouse is caused to sink by a phenomenal and unprecedented rise in a river, is not liable for damage thereby caused to goods stored therein, unless he is guilty of negligence directly contributing to such loss, for the reason that it is caused by an act of God.

WAREHOUSEMEN—NEGLIGENCE—BURDEN OF PROOF. When a bailor proves the delivery of goods to a warehouseman for storage under a contract for hire, and a failure to redeliver on demand, he makes a prima facie case of negligence, but when the warehouseman has proved that the goods were lost by the act of God, the burden shifts to the bailor to establish that the loss or damage was due to the want of ordinary diligence and care in taking care of the goods.

NEGLIGENCE—QUESTION OF LAW OR FACT.—What constitutes ordinary diligence or care in a given case is always a question of fact to be determined by the jury, in view of surrounding circumstances, when there is substantial evidence upon which to submit such an issue, but, in the absence of such evidence, it becomes a question of law to be determined by the court.

NEGLIGENCE—PRECAUTION.—It is not negligence to fail to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not have happened but for the occurrence of exceptional circumstances.

W. C. & J. C. Jones and Lee & McKeighan, for the appellants.

Lubke & Muench, for the respondent.

676 **BURGESS, J.** This action was brought by plaintiff, a brewing company, against defendants, warehousemen, to recover the value of three thousand three hundred and eighty-seven bushels of malt delivered by plaintiff to defendants, and which they failed to deliver upon demand; and also damage to four thousand **677** four hundred and forty-one bushels which were delivered by plaintiff to them, and which they returned to plaintiff in a damaged condition.

Plaintiff, who was at the time engaged in the brewing business in the city of St. Louis, stored a large quantity of malt with the defendants, who were warehousemen, and doing business as such in what was known as the Nedderhurt warehouse, on Main and Cedar streets, in the city of St. Louis, Missouri. The warehouses consisted of two connected buildings standing east and west. The one on the south was one story high, and known as warehouse B. The one on the north was three stories high, and known as warehouse A. The only connec-

tion between the two buildings is by a doorway on the first floor. The buildings were erected some twelve years before as a pork packing establishment, but had for six years at least been used for general storage.

During February and up to March 17, 1892, defendants received from plaintiff for storage one hundred and thirty-four loads of malt, all of which was stored in warehouse A, where it remained until the eighteenth or nineteenth day of May, 1892, when the building sank, and a large part of the malt was returned to plaintiff in good condition, some of it damaged by water, some of it so badly damaged as to be worthless, this part of it being abandoned by plaintiff.

The manner of the collapse was by the breaking and giving way of the concrete foundations under the pillars upon which rested the central weight of the building, thus driving or sinking three of the pillars next to the south wall near the eastern center of the building into the ground and completely out of sight, and two of the pillars in the next tier north into the ground two or three feet. The timbers did not break, nor did the walls of the building give way.

678 The soil upon which the warehouse was erected was made by accretions, was sandy, and softened when brought in contact with water. Leschen, one of the defendants, knew what the soil was, and that it was sand and loam mixed with accretions. It was shown by the evidence that this sort of soil affords a good foundation when dry, but very bad when permeated by water. During the early part of May the water in the Mississippi river began to rise, and continued to rise a few inches each day until May 19th, when the highest stage of water known at St. Louis was reached. Witnesses differed as to the probable weight contained in the building, as well also as to the carrying capacity of the first, second, and third floors, but as it is clear from the evidence that the collapse was not caused by overloading, the difference is not material. On Saturday or Sunday, the 14th or 15th of May, water from the sewer, which was backed up by the high stage of water in the river into which it empties, began to flow into the cellar of warehouse B, through the sewer opening connecting that cellar with the street sewer. On Monday, May 16th, fearing the water might get into the cellar of warehouse A and wet the cement and other articles stored there, the defendants commenced moving goods out of that cellar. There was not a large quantity of goods in the cellar of warehouse A, and they were all re-

moved during the afternoon of Tuesday, May 17th. In moving and caring for these goods the defendants employed eight men. These goods, mostly tobacco, rags, and paper, were stored in different parts of the warehouse, the largest and heaviest part being on the horse-way, which extends from east to west through this warehouse. This horse-way is something like a bridge, is on a level with Main street at one end, and on a level with the alley at the other. It is three feet higher than the cellar floor and about ⁶⁷⁹ four feet lower than the first floor, and wide enough to permit the passage of grain wagons for which it was used. This driveway was supported by separate pillars, and no part of it was connected with the building or supported by anything that was any part of the building. The balance of the goods were distributed throughout the three floors wherever there was room to place them.

No water appeared in the cellar of warehouse A until the forenoon of Tuesday, when it was discovered to be seeping through the wall of the building on the north, when defendants at once began moving the goods to an apparent place of safety from the water, and by 7 o'clock that evening had them all moved. About 8 o'clock on Wednesday morning, May 18, one of defendants' employes discovered that the first floor was not on a level, and that the floors were being gradually separated from the walls of the building to which they were attached. He immediately notified defendants' superintendent and the defendant Talbot of the condition of the floors. It was then too late to remove the goods from the building, and at twenty minutes to 9 o'clock on the next morning the pillars sank, the floors went down, and a large part of plaintiff's malt went into the cellar and into the water. Plaintiff was immediately notified, and moved such of the malt as was worth moving.

Defendants knew that the water was gradually rising for ten days or more before the collapse, and for at least four days before knew that the water was at a level with the bottom of the warehouse cellar, but did nothing with the goods except to move them onto the first, second, and third floors. Defendant Talbot testified that "with time enough, and men enough, we might be able to move what was in the building in a ⁶⁸⁰ day or two." Miller, defendants' bookkeeper, testified: "There would have been no trouble to unload the building by turning the grain into wagons, if I had thought there was any danger."

Plaintiff recovered judgment for four thousand four hundred and forty-eight dollars and thirty cents, from which de-

defendants appeal. At the close of plaintiff's evidence and again at the close of all the evidence, defendants asked an instruction in the nature of a demurrer thereto, which was refused by the court, to which ruling defendants duly excepted. It is insisted by defendants that the evidence showed that the loss and damage were occasioned by the act of God, namely, the unprecedented flood, and, as it was not shown that they were guilty of any negligence contributing to the loss and damage, that the instruction should have been given.

The testimony in the case shows one of the most extraordinary stages of water in the Mississippi river ever known in the city of St. Louis, characterized by Mr. Kochler, president of the plaintiff, and who testified in its behalf, as "phenomenal." That about four days before the pillars gave way and the floor sank the water was at a level with the bottom of the warehouse cellars, and on Tuesday morning before the collapse on Thursday, it was coming in through the wall on the north and other places, and as a result softening the sandy loam under the pillars, which caused them to sink, and the floors to give way, precipitating the malt into the mud and water. The warehouse was not overloaded and the collapse could not under the evidence be attributed to any other cause than the unprecedented high stage of water, and was what is known in law as the act of God.

The collapse being caused by reason of the act of God, defendants cannot be held to respond for the value of the malt received by them from plaintiff in ¹⁸⁸¹ storage, which they failed to return on demand, nor for damages to any of the malt received in the same way, and which was redelivered to plaintiff in a damaged condition, unless it appears from the evidence that the defendants were guilty of negligence directly contributing to the loss or damage: *Davis v. Wabash etc. Ry. Co.*, 89 Mo. 340; *Railroad Co. v. Reeves*, 10 Wall. 189; *Standard Milling Co. v. White Line etc. Co.*, 122 Mo. 258; *Turner v. Haar*, 114 Mo. 347.

The petition does not allege any negligence on the part of defendants, but alleges delivery of the goods to the defendants, and a failure to deliver on demand. Therefore, when plaintiff showed the delivery of the malt to defendants for storage under a contract with them for hire, and the failure by defendants to deliver on demand, it made out a *prima facie* case of negligence on the part of defendants; but when the defendants showed that the goods were lost and damaged by the act

of God, the burden shifted to the plaintiff to establish that the loss or damages was due to the want of the exercise of ordinary diligence and care in taking care of, and in failing to remove, the malt to a place of safety before the collapse.

In *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, it is said: "The rule, as we understand it, is that the burden of proof is upon the bailor to prove the contract and delivery of goods; then upon the bailee to show their loss and the manner of the loss. The burden then shifts to the bailor to establish that the loss was due to negligence": *Runyan v. Caldwell*, 7 Humph. 134. In *Wiser v. Chesley*, 53 Mo. 547, *Kincheloe v. Priest*, 89 Mo. 240, 58 Am. Rep. 117, *Taussig v. Schields*, 26 Mo. App. 318, and *Arnot v. Branconier*, 14 Mo. App. 431, exemption from liability by the bailee was not claimed upon the ground of the intervention of irresistible force, and those cases are in that respect distinguishable ⁶⁸² from the case at bar, and not in conflict with what has been said in this case.

From these observations it follows that defendants cannot be held liable for the loss or damage to the malt in question, unless it appears from the weight of the evidence that such loss or damage was occasioned by reason of their failure to exercise ordinary diligence and care in providing for the safety of the malt.

What constitutes such diligence and care is always a question to be determined by the triers of the facts, in view of the surrounding circumstances, when there is substantial evidence upon which to submit to them such an issue; but, in the absence of such evidence, it becomes a question of law, to be determined by the court. The question is as to whether or not there was any substantial evidence tending to show that defendants failed to exercise ordinary diligence and care in the protection of the malt. It is argued by plaintiff that substantial evidence of the want of such diligence and care was afforded by the circumstances in evidence, to wit, defendants' knowledge of the unsafe condition of the ground upon which the warehouse was erected when being permeated by water, the accumulation of water in the cellar for two or three days before the collapse, the daily increase of the flood which was a warning to them of approaching danger, the taking of heavy goods out of the cellar of the warehouse and adding them to the weight which the building was then carrying, instead of removing a sufficient amount of the goods from the building to have prevented the

sinking of the pillars. This argument has for its foundation, or it has none at all, the accumulation of water in the cellar of the warehouse during the two or three days next preceding the collapse with the knowledge of defendants, and, as a result, the softening of the ground under the pillars and their sinking into ⁶⁸³ the ground. The sinking of the pillars was unquestionably occasioned by the high stage of water in the river, which found its way into the cellar, under the pillars, and softened the ground under them, by reason of which they sank and produced the collapse. It does not appear that a similar occurrence had ever before taken place in that locality. Under each pillar the ground had been excavated about two or three feet, and the space filled with concrete from four and one-half to five feet square, and two feet thick; on this concrete was a block of limestone capping, which was about three feet square and not less than fourteen inches thick. This foundation was good when the ground was dry, but bad when wet. The building had been used for a warehouse for five or six years, had on a previous occasion carried more weight, and no indication of the sinking of the pillars had ever been observed. No such high stage of water had ever been known in that locality, consequently no bad results therefrom to admonish defendants of approaching danger by reason thereof. Then how could the defendants be held responsible for not anticipating and preparing for that which human sagacity could not have anticipated, unless we require under such circumstances a prescience, such as no human being can either claim or be held responsible for not exercising?

Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated and would not, unless under exceptional circumstances, have happened.

Ray, in his work on Negligence of Imposed Duties, pages 133, 134, says: "Mischiefs which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot ⁶⁸⁴ be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances,

a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things. The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. . . . The prudence and propriety of men's doings are not judged by the event, but by the circumstances under which they act. If they act with reasonable prudence and good judgment, they are not to be made responsible because the event from causes which could not be foreseen nor reasonably anticipated had disappointed their expectations."

So in Webb's Pollock on Torts, enlarged American edition, pages 45 and 46, it is said: "Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human ^{and} affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down, in *Greenland v. Chaplin*, 5 Exch. 248, namely, 'that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischiefs which could by no possibility have been foreseen, and which no reasonable person would have

anticipated,' may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account": See, also, *Dougan v. Champlain etc. Co.*, 56 N. Y. 1; *Hubbell v. Yonkers*, 104 N. Y. 434; 58 Am. Rep. 522; *Nelson v. Chicago etc. Ry. Co.*, 30 Minn. 74; *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613; *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; *Richards v. Rough*, 53 Mich. 212; *Sjogren v. Hall*, 53 Mich. 274; *O'Malley v. Missouri Pac. Ry. Co.*, 113 Mo. 319; *Cooley on Torts*, 91 et seq.; *Withers v. Railroad*, 27 L. J. Ex. 417; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; 38 Am. Rep. 533; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Sutton v. New York Cent. etc. R. R. Co.*, 66 N. Y. 686 243; *Bishop on Noncontract Law*, secs. 182, 447; *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386; *Wright v. Wilmington*, 92 N. C. 156.

When defendants became aware of the fact that water was accumulating in the cellar, they had no reason to expect the collapse, nor did they have until it was too late to move the goods from the building. The only danger at that time seemed to be the wetting of the goods, and damage to them in that way, and in order to prevent this they moved them from the cellar to other parts of the building in order to protect them, and in so doing acted with ordinary diligence and care. They did what seems to us an ordinarily prudent and cautious person would have done under the circumstances, which was all the law required.

It follows that the instruction asked by defendants at the close of all the evidence should have been given.

The judgment is reversed.

Gantt, P. J., and Sherwood, J., concur.

WAREHOUSEMEN—LIABILITY OF—CARE AND DILIGENCE REQUIRED.—It is well settled that warehousemen are not, like common carriers, insurers of goods committed to their charge, and liable for all losses not occasioned "by the act of God or by the king's enemies," but are ordinary bailees for hire, and, as such, bound only to common care and diligence, and liable only for want of such diligence and care: See monographic note to *Schmidt v. Blood*, 24 Am. Dec. 145. They are not insurers against accidental fire: *Aldrich v. Boston etc. R. R. Co.*, 100 Mass. 31; 97 Am. Dec. 74; *Lancaster Mills v. Merchants etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586, and note; *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902.

WAREHOUSEMEN—NEGLIGENCE—BURDEN OF PROOF.—The doctrine deducible from the cases is, that a ballor seeking to recover from a warehouseman for the nondelivery of goods, or an injury thereto, must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a prima facie case. If the defendant accounts for the nondelivery or injury by showing that the goods were stolen, or were lost or damaged by fire, or in any manner consistent with the exercise of ordinary care on his part, the plaintiff's prima facie case is overcome, and he must prove positive negligence occasioning the loss: See monographic note to *Schmidt v. Blood*, 24 Am. Dec. 153; *Clafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Higman v. Camody*, 112 Ala. 257; 57 Am. St. Rep. 33.

NEGLIGENCE—WHAT IS NOT.—A person is not negligent in failing to provide against a danger that could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist: *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823, and note; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; 58 Am. St. Rep. 709, and note.

JONES v. HOWARD.

[142 MISSOURI, 117.]

EXECUTION—INTEREST OF VENDOR OF REAL PROPERTY—WHEN NOT SUBJECT TO.—One who has made an enforceable contract to sell real property, received part of the purchase money, and placed the vendee in possession, retains only a vendor's lien for the balance of the purchase price, and has no estate subject to the lien of a judgment or execution. A purchaser at a sheriff's sale under a writ against the vendor, with notice of the facts, acquires no title.

Moore & Williams, for the appellant.

James E. Hazell, for the respondent.

120 Macfarlane, J. Thomas W. Howard died in October, 1893, intestate, seised of a tract of land in Moniteau county, which he occupied with his family as a homestead. He left surviving him a widow and five adult sons, named, respectively, James A. J. Howard, John D. H. Howard, Thomas H. F. Howard, Henry B. S. Howard, and Richard P. W. Howard. On October 25, 1893, the sons entered into an agreement among themselves for the settlement of their father's estate. The part of it relating to the land is as follows:

"The said J. A. J. Howard, J. D. Howard, and T. H. F. Howard agree to convey all their interest in the real estate of the said T. H. Howard, deceased, to the said H. B. S. Howard and R. P. W. Howard, upon the said H. B. S. Howard and R. P. W. Howard paying each of them the sum of five hundred dollars."

On the day this agreement was made, defendant Henry B. S. Howard paid thereon to J. A. J. Howard the sum of five dollars. Previous to the sale the parties were in the joint possession of the land, and afterward the ¹²¹ vendee continued in the sole possession. On the third day of November, the said defendant paid to J. A. J. Howard four hundred and ninety-five dollars, the balance of the agreed sum, and the latter, together with the other heirs, executed and delivered to the former a deed conveying to him a portion of said land.

In March, 1887, one George F. Tower recovered a judgment in the circuit court of said county against the said J. A. J. Howard for three hundred and thirty-one dollars and seventy-seven cents, and on the second day of November, 1893, he sued out an execution thereon and had the same levied upon the interest of the said judgment debtor in the land of which his father died seised as aforesaid. On the same day he caused a notice of said levy to be filed in the office of the recorder of deeds of said county. The interest so levied upon was sold by the sheriff in March, 1894, and plaintiff became the purchaser, to whom a deed in due form was executed, acknowledged, delivered, and recorded. Plaintiff had notice before he purchased of the sale and conveyance of the land by the judgment debtor to defendant.

This suit is brought and prosecuted by plaintiff against the said H. B. S. Howard, and Harriet Howard, the widow of said deceased, for the assignment of dower and homestead to the widow and for partition of the land between himself and the said H. B. S. Howard. Plaintiff claims under his sheriff's deed the one-fifth interest which James A. J. Howard inherited from his father. Defendant claims the same interest by virtue of his purchase and deed from the said James A. J. Howard.

The questions may be made clear by a restatement of the facts in chronological order. In March, 1887, judgment was rendered against James A. J. Howard in the circuit court of Moniteau county. In October, 1893, the said James inherited the land. ¹²² October 25, 1893, James sold the land to defendant by contract for five hundred dollars, of which five dollars was paid in cash. November 2, 1893, execution issued, levied upon the land, and notice filed. November 3, 1893, defendant paid the balance of purchase price, four hundred and ninety-five dollars, and received a deed from the said James. March, 1894, sheriff's sale to plaintiff.

The circuit court held that plaintiff acquired no interest in the

land by virtue of his sheriff's deed, rendered judgment for defendant, and plaintiff appealed.

The statutes of Missouri provide that "all real estate whereof the defendant, or any person for his use, was seised in law or equity, at the time of the . . . rendition of the judgment, order, or decree whereon execution was issued, or at any time thereafter," shall be liable to be "seised and sold upon . . . execution issued from any court of record": Rev. Stats. 1889, sec. 4915. The lien of an execution dates from filing for record the notice of the levy: Rev. Stats. 1889, sec. 4922. It is further provided that the term "real estate," as used in said section, "shall be construed to include all estate and interest in lands, tenements, and hereditaments": Rev. Stats. 1889, sec. 4917.

We do not find that the precise question here involved has ever been decided by this court. It has been held, however, that when parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser which is subject to sale under execution, "upon the principle that the vendor is to be regarded as seised in equity to the use of the purchaser." But it is said: "If no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seisin in the seller, even in equity, to the ¹²³ purchaser's use, and there is no interest in the land in him which is liable to sale or execution: *Brant v. Robertson*, 16 Mo. 149; *Quell v. Hanlin*, 81 Mo. 441; *Block v. Morrison*, 112 Mo. 351. In the case last cited it is said: "That a title bond for the conveyance of land gives the vendee an interest which he may sell cannot be doubted. The principle of law is well settled that, where there has been a contract for the sale of land, the vendor becomes the trustee of the land for the vendee, and that the vendee has an interest in the land which may be sold under execution."

In *Black v. Long*, 60 Mo. 182, it was held that in case the vendee has paid the purchase money, is put in possession of the land, and has made valuable improvements thereon, the vendor retains no interest in the land which is subject to sale under execution. "Under such facts," it is said, "he would have been entitled to specific performance." The vendor "could not have dispossessed him in ejectment. His equities would have constituted a perfect defense, and would have effectually defeated an action."

This decision was approved in *Parks v. People's Bank*, 97 Mo. 133; 10 Am. St. Rep. 295. In that case, the vendee had paid the

purchase price, and was in possession under his contract when the judgment against the vendor was rendered. Before sale under execution, the vendor by deed, conveyed the property to the vendee, and the deed was recorded. In this state of facts the court says: "The equitable title of plaintiffs being complete before the judgment, and supplemented by a deed of the legal title before the execution sale, the case was brought precisely within the facts of *Black v. Long*, 60 Mo. 181, and within the rule of *Davis v. Ownsby*, 14 Mo. 170"; 55 Am. Dec. 105. In these cases the vendor held the legal title in trust for the vendee who had possession of the land accompanied with the entire equitable title. The vendor retained ¹²⁴ no interest in the land that he could transfer to another, nor that could be transferred by sale on execution against him. He had parted with all real interest before the judgment was rendered, and held only a naked trust which was executed by deed duly recorded before the sale was made: *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105.

In *Anthony v. Rogers*, 17 Mo. 394, the vendee, under a title bond, tendered the amount due and demanded a deed which was refused. The court held that the vendee acquired an interest which was subject to sale under execution upon a judgment rendered against him, subsequent to the tender, and that the purchaser was entitled to a conveyance from the vendor upon payment of the purchase price. It has often been held by this court that a grantor in a deed, fraudulent as to creditors, retains an interest in the land which is subject to sale under execution. The deed in such case being fraudulent, the grantee is seised for the use of the grantor: *Rankin v. Harper*, 23 Mo. 584; *Dunnica v. Coy*, 24 Mo. 168; 69 Am. Dec. 420.

None of these decisions precisely fit the case at bar, but we think they settle the principle that there must be a direct beneficial interest in the land in order that it may be subject to a lien of the judgment or execution: *Broadwell v. Yantis*, 10 Mo. 403.

After *J. A. J. Howard* had sold, by a written contract, his interest in the land to his brother, and received a part of the purchase money, and the vendee took and held the exclusive possession which he had previously held in common with his vendor, he retained no real interest therein. By his contract he parted with all beneficial interest in the land except the mere incidental right to a vendor's lien for the balance of the purchase price. He continued to hold the legal title, but only in trust for his vendee, who had the right to demand a conveyance thereof when-

ever the ¹²⁵ purchase money was paid. The simply legal title as trustee without possession did not constitute an interest in land which was subject to the lien of a judgment or execution: *Black v. Long*, 60 Mo. 181. If the legal title had been put in a third party to hold in trust until payment of the purchase money, there would have been no interest left in the vendor which could have been sold under execution, yet his real beneficial interest would have been the same. If he had made a deed to the purchaser instead of a contract, his real interest in the land would not have been changed. He would still have his lien for the purchase price, and by the contract he has nothing more. The vendor occupies the situation of a mortgagor out of possession. The lien is a mere incident of the debt and passes by its assignment. It is not subject to sale, but must be reached by garnishment proceedings.

We are aware that the authorities are not harmonious on this question. Indeed, the apparent current of judicial decision seems to be that the interest of the vendor in such case is subject to sale under execution: *Freeman on Executions*, sec. 191; *Freeman on Judgments*, sec. 363; *Black on Judgments*, sec. 438, and cases cited. But we are of the opinion that the rule that a vendor who has received a part of the purchase money, and has put the vendee in possession of the land under the contract of sale, retains no such direct beneficial interest in the land as is subject to sale under execution, is more in accord with our own decisions and with the spirit of our statute. The rule also has the approval of very respectable authority: *Chisholm v. Andrews*, 57 Miss. 637; *Tally v. Reed*, 72 N. C. 336; *Adickes v. Lowry*, 15 S. C. 132.

Some of the cases holding the contrary doctrine also held that the vendee, "if in possession of the land sold, is not bound to ascertain, before making each ¹²⁶ payment, that no judgment has been obtained against his vendor," and unless he have actual notice of the judgment, his payment will be good. *Freeman* says that this principle is conceded everywhere, "and seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule": 2 *Freeman on Judgments*, sec. 364; *Moyer v. Hinman*, 13 N. Y. 180.

We think it best to adopt a rule just and reasonable in itself and which requires no exceptions in order to avoid hardships.

If the purchaser at the sheriff's sale had no notice of the contract or deed, either actual or constructive, he would, of

course, have taken the title as against both the vendor and vendee. In this case, however, defendant's deed was not only of record, but plaintiff had actual notice thereof before his purchase: *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105.

The judgment is affirmed.

Barclay, P. J., Robinson, and Brace, JJ., concur.

EXECUTION—INTEREST OF VENDOR UNDER CONTRACT TO PURCHASE LAND.—The interest of a vendor who has made a contract of sale and received part of the purchase money is not subject to attachment or execution though he retains the legal title: *Burke v. Johnson*, 37 Kan. 337; 1 Am. St. Rep. 252. A vendor who, by contract, subsequently releases his trust deed for the payment of installments of the purchase price and reserves merely an equitable lien, possesses only a chose in action, and no interest which can be subjected to sale under execution: *Fallon v. Worthington*, 13 Colo. 559; 16 Am. St. Rep. 231, and note.

SHERLOCK v. KANSAS CITY BELT RAILWAY Co.

[142 MISSOURI, 172.]

STREETS AND HIGHWAYS.—ABUTTING OWNERS HAVE A RIGHT appurtenant to their property of access to it from the adjacent streets and alleys, and this right is as inviolable as their right to their property.

STREETS AND HIGHWAYS, RAILWAYS IN, WHEN IMPOSE AN ADDITIONAL SERVITUDE.—Although the laying of a railway track on the established grade and operating a steam railway thereon do not subject a street to a servitude different from that contemplated in the original dedication, the rule is subject to the qualification that the street cannot be used for sidetracks, water tanks, and like structures.

STREETS AND HIGHWAYS.—The laying and operating of a railroad in a public street for a private use cannot be authorized by a municipality.

STREETS AND HIGHWAYS—PRIVATE USE OF RAILROADS, WHAT IS NOT.—A railroad switch track constructed in a public alley by authority of a city and connected with the main line of, and operated by, a railway corporation is not for a private, but for a public, use, where the control of the cars and the business of transportation is not by the merchants who are served by such switch, but is in such corporation.

STREETS AND HIGHWAYS.—THE EXCLUSIVE USE OF A STREET OR HIGHWAY cannot, by a municipal corporation, be granted to any one person or corporation.

STREETS AND HIGHWAYS—RAILROADS, EXTENT TO WHICH MAY BE AUTHORIZED TO USE.—Although the construction and operation of a steam railroad in a public street may be authorized without imposing an additional servitude, and hence without entitling abutting property owners to compensation, this rule is wholly inapplicable where such construction or operation must destroy the use of the street or highway as a public thor-

oughfare or unreasonably interfere with the right of abutting property owners to have access to, and egress from, their property to such street or highway.

STREETS.—ABUTTING PROPERTY OWNERS ARE ENTITLED TO AN INJUNCTION to prevent the maintenance and operation of a steam railroad in a public alley, when such maintenance and operation must destroy its usefulness as a public thoroughfare or unreasonably interfere with the right of the abutting property owners of access to, and egress from, their property.

INJUNCTION BEFORE DEFENDANT HAS BEEN GUILTY OF THE THREATENED INJURY.—It is no objection to the granting of an injunction to prevent a railroad corporation from maintaining and operating a steam railroad in a public alley whereby abutting owners must be deprived of the right of access to and egress from their property, that the defendant has not yet been guilty of the threatened injury, if, in the course of operating its road in the manner contemplated by it, such injury must result.

Pratt, Dana & Black, for the appellant.

Kenneth McC. De Weese, for the respondents.

176 GANTT, P. J. This is an appeal from a decree of the circuit court of Jackson county perpetually enjoining the defendant, a steam railroad company, organized under the laws of this state, from constructing its track and operating its engines and cars along a public alley from Seventeenth to Eighteenth streets and between Walnut street and Grand avenue, in Kansas City, Missouri.

The plaintiffs are the owners of lot 367 in block 28 in McGee's addition in Kansas City. Said lot fronts on the west side of Grand avenue, with a width thereon of forty-nine and one-half feet, and runs westwardly one hundred and fifteen and six-tenths feet to said alley. Said alley is sixteen and one-half feet wide, is a public thoroughfare dedicated as an alley **177** when the addition was platted, and extends north and south through several blocks, ending at the south at defendant's yards and at the north end between Fifteenth and Sixteenth streets. At the commencement of this suit plaintiffs were the owners of two livery and sale stables on their said lots, and said stable abutted on said alley, and said alley was used by the lessee in removing manure from the rear of the stable. Some time in the year 1891 the common council of Kansas City, by ordinance, granted the defendant company the right to construct, maintain, and operate a switch track north and south along said alley through blocks 18, 23, and 28 of McGee's addition from the south line of Eighteenth street to the north terminus of said alley and to cross Sixteenth, Seventeenth, and Eighteenth streets with said tracks, and in 1894, by another

ordinance, granted the right to lay a sidetrack not less than twelve nor more than thirteen feet west of the center of said switch track. In October, 1894, under and by virtue of these ordinances, the defendant began digging out and grading said alley in the rear of plaintiff's lot to bring it to the grade established in 1877 previous to the erection of plaintiff's building. This grading lowered the surface of the alley from two to five feet. Defendant also began to construct a standard gauge railroad track in said alley and had hauled its material on the ground for that purpose.

The original application for injunction in this case was filed November 3, 1894. A restraining order was granted, and November 21st the amended petition was filed upon which the cause was heard. The temporary restraining order was revoked. The petition contains averments of the ownership of the lots in question, the incorporation of the defendant railroad, ¹⁷⁸ the chartering of Kansas City, the nature and relative situation of the adjacent streets and alleys as already stated, and then charges that:

"Afterward and some time on or about the — day of October, 1894, or some time shortly thereafter, said defendant entered into and upon said alley named, running north and south through said block 28 from Seventeenth street to Eighteenth street as aforesaid, and where said lot 367 adjoins or abuts upon said alley, and dug out and graded down and removed the earth and stone from said alley where plaintiffs' said lot abuts thereon, to the depth of five or six feet, and are now constructing, and intend to construct in said alley a railroad switch track of standard grade in said alley from Eighteenth street to Seventeenth street for private use, so that said alley along that portion thereof from Eighteenth street to Seventeenth street will be entirely and wholly occupied by said defendant with its said railroad track and engines and cars used thereon to the exclusion of all other persons whomsoever, and whereby said defendant will wholly destroy said alley as a public thoroughfare, and will confine the same to its own exclusive use without lawful authority, or any authority whatever, and wrongfully, to the great and irreparable damage of plaintiffs, which said obstruction so placed and maintained, and intended to be placed and maintained, by said defendant in said alley, will constitute a public nuisance to the whole public of the state of Missouri and a private nuisance to these plaintiffs. That in addition to the wrong and injury sustained by these plaintiffs as aforesaid, the said defendant is now con-

structing and intends to construct across East Eighteenth street and across East Seventeenth street in said city, between which said streets the property of plaintiffs abut on said Grand avenue, a double track railroad switch ¹⁷⁹ track of standard gauge for private use to be used in connection with and as a part of said proposed railroad switch track in said alley; that said East Seventeenth and said East Eighteenth streets are public highways and thoroughfares and are important traveled highways in said city, and that by reason of the construction and operation of said railroad switch track across said East Seventeenth and East Eighteenth streets travel will be diverted from said streets and from said Grand avenue, and thereby decrease the value of plaintiffs' property and take away trade heretofore enjoyed by them; that the said injuries will be continuous, irreparable, and unascertainable, and cannot be compensated in damages. That in addition to the wrongs and injuries sustained by the entire public by reason of the nuisances aforesaid, these plaintiffs will sustain local and specific damages and injuries to their said property and in the use thereof, which said damage and injury is local, peculiar, and specific to them, and separate and different from that of the public generally or other persons who may suffer injury thereby; that said damage and injury so threatened by reason of the construction of said railroad track and engines and cars will be continuous, irreparable, and cannot be compensated in damage; that plaintiffs are without adequate remedy at law or any remedy whatever for the injuries and wrongs as aforesaid, except in equity for the abatement of said nuisances and the restoration of said street to the use of the public and especially for the free and open use of these plaintiffs in connection with their said lot.

"Wherefore plaintiff prays that said defendant may be enjoined and restrained from constructing said railroad track in said alley, or from the obstruction and destruction of said alley as a public highway," et cetera.

Defendant's answer consists: 1. Of a general ¹⁸⁰ denial; 2. That plaintiffs consented to the building of said railroad in said alley, and led defendant to believe that it had a right to construct and maintain the same, and upon faith thereof defendant expended large sums of money; 3. That it was a railroad organized and existing under the laws of Missouri and Kansas, and authorized to maintain and operate a railroad and engage in the switching business. Admitted that it was engaged in constructing a railroad in said alley, averred that in 1877 Kansas City had established the grade of said alley by ordinance, and afterward by

ordinance granted defendant the right to construct, maintain, and operate a railroad track over and upon said alley, and that pursuant to such authority defendant was at the time of the institution of this suit proceeding to construct said railroad. "That in the construction of said railroad upon said alley, pursuant to such grant by said city, it was necessary to excavate the surface of the alleyway to the grade established by said city, and such excavation was made almost to said grade when the injunction herein was served, and the plaintiffs claim that by reason of these acts their property will be damaged. That the doing of such work and the construction and maintenance of such railroad are for the public use, and the amount of compensation to be paid therefor cannot be agreed upon between the parties; wherefore it becomes necessary for the court to take some steps to ascertain the amount of damage, if any, that will be sustained by reason of the proposed action of defendant. Wherefore defendant asks that the court take such steps as are necessary to permit this defendant to acquire the right as against the plaintiffs to construct, maintain, and operate its said railroad over the said alley, by the appointment of commissioners, by condemnation proceedings, or in such other manner as the court may deem proper."

¹⁸¹ At the April term, 1895, the cause was heard and a perpetual injunction granted enjoining and restraining defendant from constructing, operating, or maintaining its railroad in said alley, and directing defendant to remove the railroad track from said alley from Seventeenth to Eighteenth streets. From that decree, after proper steps in the circuit court, this appeal is prosecuted.

Upon the hearing, in addition to the facts already stated, it appeared that after the dissolution of the restraining order and prior to the final hearing the company proceeded to lay its railroad track in said alley; that said track was not laid in the center of said alley; that the cars which said company proposed to use on said track averaged ten feet in width; that it was impossible for teams or vehicles to pass through said alley when said trains were moving therein; that the ordinance of the city placed no limit whatever upon the number of trains defendant might run upon said tracks nor the length of time they should be allowed to stand thereon; that another ordinance of the city required all livery and sale stables abutting upon alleys to maintain doors opening outward upon said alleys to expedite the escape of stock in case of fire. There was also evidence that the rear doors of said buildings were used for carrying out manure and rubbish

that would necessarily accumulate in said stables; that when cars were allowed to stand in the alley, or were passing, there would remain a space of only three and one-half feet on either side for the passage of vehicles or animals. There was no evidence that up to the time of the trial the cars of the company had been allowed to stand upon the track in the alley, and the then superintendent of the company disavowed any intention of permitting them to do so. The evidence further tended to prove that the operation of the road on said alley in the rear ¹⁸² of said buildings would depreciate their rental value and their market value for sale.

1. "Few questions have come before the courts in this generation of greater practical importance or involving larger pecuniary interests than those growing out of the construction of railways in city streets. Whether such streets may, under legislative and municipal authority, be occupied by railroad tracks, to the inconvenience of abutting owners, without making compensation, and what limitation, if any, there is to the legislative power over streets which cannot be transgressed without violating the legal and constitutional rights of lotowners, are questions which have excited the gravest debate and have been the subject of the most careful judicial consideration": Andrews, J., in *Kane v. New York etc. R. R. Co.*, 125 N. Y. 175.

Judge Cooley, in his *Constitutional Limitations*, third edition, page 651, remarks that "it is not easy to trace a clear line of authority running through the various decisions bearing upon the appropriation of highways and streets to the use of any grade or species." And such is and must be the testimony of anyone who attempts to reconcile "the vacillation of the courts on this subject." Streets are highways dedicated primarily for public travel by ordinary methods, but they are not exclusively devoted to that purpose: *Elliott on Roads and Streets*, c. 26, p. 524. Abutting owners have the right appurtenant to their property of access to it over the adjacent streets and alleys, and this right is as inviolable as the right to the property. While this court, by a long line of decision from *Lackland v. St. Louis etc. Ry. Co.*, 31 Mo. 180, down to and including *Gaus etc. Mfg. Co. v. St. Louis etc. Ry. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, has held that "the laying of a railroad track on the established grade and operating a steam railroad thereon does not subject the street to a servitude ¹⁸³ different from that which was contemplated in the original dedication," it has been seriously questioned, and it may be gravely doubted whether the weight of modern author-

ity in this country is not rightly arrayed against such a doctrine. Nor has it been accepted with us without qualification. A street cannot be used for sidetracks, water tanks, or like structures: *Tate v. M. K. & T. Ry. Co.*, 64 Mo. 149. As already stated, the tracks must be laid to grade so that the only obstruction would be the passing of trains; otherwise, an action will lie to abutting owners: *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 320; *Smith v. Kansas City etc. Ry. Co.*, 98 Mo. 24; *Knapp v. St. Louis etc. Ry. Co.*, 126 Mo. 26. A railroad laid in a street without municipal authority is a public nuisance: 23 Am. & Eng. Ency. of Law, 1093. The franchise must be granted for public and not for private purposes: *Glaessner v. Anheuser-Busch Brewing Co.*, 100 Mo. 508. This last proposition brings us to the first contention of the plaintiffs, to wit, that this railroad switch track is a private use of the public highway. It is earnestly insisted by learned counsel for plaintiff that while the defendant is a railroad corporation under the laws of this state and a common carrier, the use for which it proposes to maintain this switch track is private. This contention must be ruled against plaintiffs. In *Brown v. Chicago etc. Ry. Co.*, 137 Mo. 529, it was ruled that a switch track constructed in an alley by authority of the city, and connecting with the main line of, and operated by, a railroad company, was under article 12, section 14, of the constitution of Missouri, for public use. Said the court: "We cannot declare that to be a private use which the law makes a public use." There, as here, the company constructed and operated the track. The private merchants who were served by the switch had no control or management of the cars or the business of transportation. We are satisfied that the principle thus announced is correct: *Knapp v. St. Louis etc. Ry. Co.*, ¹⁸⁴ 126 Mo. 26. But again, while a municipal corporation may ordinarily authorize the laying of a railroad track in a street or alley, still it must exercise this right in such a manner as not to destroy the use of the street or highway as a public thoroughfare, or unreasonably interfere with the right of abutting owners to have access to and from their property on said highway. It has no power to grant the exclusive use of any highway to any one person or corporation. In *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, this court sustained a decree enjoining the operation of a railroad on a street in St. Louis upon the complaint of abutting owners. The street in that case was twenty-four feet wide between curbs, so that the ordinary business upon the street could not be carried on at the same time

with that of the railroad. It was held that the grant was virtually a monopoly of the use of the street, and that the city had no power to thus divert the street from the uses to which it had been dedicated.

In *Knapp v. St. Louis Transfer Ry. Co.*, 126 Mo. 26, the company was authorized by a city ordinance of St. Louis to lay down, maintain, and operate a switch track to connect with St. Louis Union Stock Yards "along the western portion of Hall street." Under this grant the company constructed its railroad along and upon what would be the west sidewalk under the general terms of the ordinances, right up to the line of *Knapp, Stout & Co.*'s property abutting on said street. It was evident that such a railroad destroyed the use of the street for ordinary travel. Upon a review of the former decisions of this court, among others *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, this court said: "Taking these cases all in all, it is very clear a municipal corporation has no power to grant to a railroad company such use of a street as will destroy its usefulness as a public thoroughfare, or destroy or ¹⁸⁵ unreasonably interfere with the right of an abutting property holder of access to or egress from his property. . . . This track, placed on what is properly the sidewalk close up to plaintiff's lot, is an unlawful structure, one which the city did not and could not legalize as against the rights of plaintiff. The injury inflicted upon the plaintiff is of a continuous character and the case is one calling for equitable relief." Afterward, in *Schulenburg etc. Lumber Co. v. St. Louis etc. R. R.*, 129 Mo. 455, this court cites both *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, and *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, with approval both as to the want of power in the city to authorize a steam railroad through a street so narrow that such use would necessarily destroy it as a public way, and deprive abutting owners of access to their property, and as a proper case for relief by injunction.

The municipal council of Kansas City has large powers over the streets, alleys, and public highways of said city; still, it must exercise that power in conformity to the constitution of the state. By the dedication of streets and alleys to public use a trust is confided to the city to preserve and utilize them for that purpose only. The city has no power to destroy the alley on which plaintiffs' property abuts, as a thoroughfare: *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86; 43 Am. St. Rep. 547.

More than this, the city has no power to grant the use of

this alley to a railroad company to lay its tracks therein and operate its engines and cars thereon, if the ordinary and reasonable effect of such a grant will be to prevent or unreasonably impede and obstruct the passage of vehicles belonging to the abutting owners or other members of the public desiring to use such alley.

Now the facts of this case are so obvious that their bare statement demonstrates that the ordinance permitting the laying of this track with the unlimited ¹⁸⁶ right to run steam-engines and cars thereon at all times of day or night practically gives defendant the monopoly of that alley, the very nature of its use by the defendant each time totally obstructing it and excluding all others therefrom. Such a use is not to be compared to that ordinary inconvenience or delay which an ordinary wagon or vehicle may cause to another of like kind. The facts of this case bring it clearly within the principles which governed in *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86; 43 Am. St. Rep. 547.

It remains only to consider the objection that as yet the company has not been guilty of the threatened injury. It is, however, conceded that it has constructed its track and proposes to operate its road thereon, and this brings it within the peculiar jurisdiction of a court of equity to prevent a threatened injury. Had the plaintiffs sat idly by until a large expenditure of money had been made, defendant might well have complained, but they notified defendant at once and have had recourse to every means in their power to prevent the destruction of this highway on which their property abuts. The nature of the obstruction, the use to be made of the alley as a steam railroad, leaving no pass-way for animals or vehicles, fully establishes the charges of the petition. It would be a continuous damage to the plaintiffs, and they are entitled to the injunction granted. There is no conflict between the views here expressed and the opinion in *Brown v. Chicago etc. Ry. Co.*, 137 Mo. 529.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

MUNICIPAL CORPORATIONS—POWER OVER STREETS.—Power vested in a city to regulate the use of its streets refers to the legitimate public uses not inconsistent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners: *State v. Murphy*, 134 Mo. 548; 56 Am. St. Rep. 515, and note.

MUNICIPAL CORPORATIONS—POWER OVER STREETS.—RAILROAD IN STREET—WHEN ADDITIONAL SERVITUDES. The authorized use of a public street for street railroad purposes,

no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting landowners along the street to compensation: *Note to San Antonio etc. Ry. Co. v. Limburger*, 53 Am. St. Rep. 737, 738. But a street railway company has no right to lay a horse railway in a city street solely as a freight transfer track between two steam railways without compensation to the adjoining landowners: *Carli v. Stillwater Street Ry. etc. Co.*, 28 Minn. 373; 41 Am. Rep. 290. See, also, monographic note to *Western etc. Co. v. Citizens' Street R. R. Co.*, 25 Am. St. Rep. 475-482. And a commercial street railway is held to be an additional servitude in *Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 95 Wis. 561; 60 Am. St. Rep. 136, and note.

HIGHWAYS—RIGHTS OF ABUTTING OWNER—INGRESS AND EGRESS.—An abutting proprietor is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is property, subject, however, to legislative control. Any infringement of this right, caused by the use of the street for other than legitimate street purposes, is a "taking" within the meaning of the constitution: *Willamette Iron Works v. Oregon etc. Ry. Co.*, 26 Or. 224; 46 Am. St. Rep. 620, and note. A street railway company is subject to an action for damages by an abutting owner whose right of ingress and egress will be interfered with: *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186; 43 Am. St. Rep. 89, and note. As to whether the use of streets for railway purposes is a taking of private property, see extended note to *Stanley v. Davenport*, 37 Am. Rep. 224-229.

FISHER v. KEITHLEY.

[142 MISSOURI, 244.]

WILLS.—THE DOCTRINE OF ADEMPMENT applies only to cases of personal property, and is entirely inapplicable to devises of real property.

WILLS.—THE RULE RESPECTING THE ADEMPMENT OF LEGACIES was adopted by courts of equity to prevent a child from getting a double portion, an inequality which it is but fair to presume the testator did not intend.

WILLS.—A DEVISE OF REAL PROPERTY IS NOT ADEEMED OR REVOKED by a subsequent deed of gift of real property made by the testator to the devisee.

WILLS.—THE DOCTRINE OF ADEMPMENT CANNOT BE APPLIED where the property subsequently transferred by the testator to the legatee was transferred for a valuable consideration and upon an agreement that the latter would support the former.

WILLS.—A CONVEYANCE TO A DEVISEE BY A TESTATOR cannot be held to have been made in satisfaction of such devise, where there is no evidence that the devisee consented to accept it in such satisfaction.

John Megown, for the appellant.

George A. Mahan and F. L. Schofield, for the respondent.

247 MACFARLANE, J. In the year 1869, Roland Keithley

was seised in fee of a tract of land containing about three hundred acres upon which he resided. He had a number of children, all of whom had left the paternal ²⁴⁸ home, except his son, John C. Keithley, who was married, and lived with him upon the farm. On the third day of May, 1869, the said Roland Keithley made and published his last will under which he sought to dispose of his entire estate among his children. He devised to his said son John C. one hundred acres of said land, describing it. In connection with this devise the will recites: "Which said devise over and above the amount bequeathed to my other children, I deem just and right on account of the ill-health of my said son and his affectionate care of me in my old age." The residue of his property he directed should be sold and the proceeds thereof divided among the other children.

John C. continued to reside with his father for about three years after the execution of the will, when he moved to the state of Illinois, where he remained about two years. Soon after his return, his father, the said testator, conveyed to him in fee simple one hundred and fifty acres off the north side of said farm, which included the mansion house and other buildings. This one hundred and fifty acres was separated from the one hundred acre tract by a strip of land about eighty yards wide and over two thousand yards long. The express consideration for this deed is "the care and support of said Roland Keithley [the grantor] and ten dollars." The grantor was over eighty years of age when this conveyance was made, and died in three or four years after. After the death of his father the said John C. Keithley conveyed both tracts to plaintiff Fisher, who commenced this suit in ejectment to recover the possession of the one hundred acre tract February 7, 1891. There had been some previous litigation in regard to the conveyance and the devise, both of which had been adjudged valid.

The petition is in the usual form of actions of ejectment. By his answer, after a general denial, defendant ²⁴⁹ stated in detail the facts hereinbefore noted, and charged that: "The said one hundred and fifty acres so conveyed was of much greater value than the one hundred acres devised to said John C. Keithley by the will, that it was conveyed to him and accepted by him in full satisfaction of his interest in said estate, and that in equity and good conscience the said conveyance to him and acceptance by him of the said tract of one hundred and fifty acres did, and considering all the facts and circumstances, should, operate as a complete and full ademption of said devise

of one hundred acres, under which devise this plaintiff claims title." The answer further charged that plaintiff purchased the land with full notice of all the facts and circumstances under which it had been devised to his grantor.

The issues were tried by the court. Defendant, in support of his answer, offered evidence tending to prove all the allegations thereof. The evidence also tended to prove that the testator, Roland Keithley, when he made the deed, believed that the will had been destroyed, and that John C. Keithley had forfeited the right to the devise to him for the reason that he had not continued to live with and care for him. The court found for the plaintiff, and judgment was rendered accordingly, and defendant appealed.

1. The claim of defendant, as it appears from the answer, is that the devise of the one hundred acre tract made to John C. Keithley, under the will of his father, Roland Keithley, was adeemed, revoked, or satisfied, by the subsequent conveyance to him of the one hundred and fifty acre tract.

It must be agreed that the evidence tends to prove, indeed is very convincing, that the testator intended that the provision made by the deed should operate as a revocation of the devise, or rather, he believed that the devisee had forfeited the testamentary provision ²⁵⁰ by reason of leaving home and ceasing to care for him. There was no evidence, however, tending to prove that the devisee had such an understanding when he accepted the deed. The grantor had the right to make the deed for the consideration therein expressed and it has been held valid by this court: *Keithley v. Keithley*, 85 Mo. 220. It must be conceded, furthermore, that by the will and deed, giving them both effect, the said John C. Keithley secured the bulk of his father's estate, to the virtual disinheritance of the other children. This disposition of the property is manifestly inequitable, but the will has also been confirmed by the judgment of this court: *Owens v. Sinklear*, 110 Mo. 55.

So we must then take the will and deed together, both of which, taken separately, are valid instruments, and determine whether or not the latter revoked, adeemed, or satisfied the provision made for said devisee in the former, assuming, as the evidence tends to prove, that the testator intended it to have that effect.

2. In the first place, all the authorities, so far as we are advised, except one which we will notice further on, agree that the doctrine of ademption only applies to bequests of personal

property. We find but the one case, in the absence of a statute, in which it has been held applicable to the devises of real estate: 2 Story's Equity Jurisprudence, sec. 1111; 1 Am. & Eng. Ency. of Law, 2d ed., 611, and authorities cited; 1 Roper on Legacies, 365; 2 Woerner on Administration, sec. 446; Burnham v. Comfort, 108 N. Y. 539; 2 Am. St. Rep. 462; Allen v. Allen, 13 S. C. 512; 36 Am. Rep. 716. Counsel for defendant argues with much force that no sufficient reason exists on principles of equity for the distinction made in applying the doctrine to a bequest of a legacy and refusing to apply it to a devise of real estate.

²⁵¹ It is true the doctrine of ademption is founded upon principles of justice in order to work out a fair and equal division of the estate of a parent, or one standing in the relation of a parent, among all the objects of his bounty. Courts act on the presumption that a parent intends that all the objects of his bounty shall share equally in his estate, and in case he has given a legacy to one by will, and afterward a gift or advancement to the legatee of property of the same kind, that he intends to adeem or take away the legacy in whole or in proportion to the value of the donation. The doctrine is applied on the same principle as is that of advancements in case of intestacy. The reasons for the rule, as expressed by Lord Hardwicke, are: "This court inclines against double portions. Another good one: the court considers it as a performance of what was intended to be done, and paying the debt of nature which he owed his child": *Watson v. Lincoln*, 1 Amb. 325. "It is a rule adopted by courts of equity to prevent a child from getting a double portion, an inequality which it is but fair to presume the testator did not intend": *Wallace v. DuBois*, 65 Md. 153.

While no reason, on principles of justice and equity, seems to exist for the distinction made between a bequest of personal property and a devise of real estate, yet the distinction has ever been most uniformly made by the courts, not because the equities are not the same, but because of the safeguards that have ever been thrown around the transfers of real estate, and contracts by which titles are affected. The rule has remained unchanged by the legislation of this state, though questions of the revocation of wills and of advancements have been dealt with, and we must assume that no change has been considered desirable. We do not think the courts, at this day, should

take ²⁵² the initiative in abrogating a rule which has been so long and so universally approved.

The statute of frauds requires all agreements affecting the title to real estate to be in writing (Rev. Stats. 1889, sec. 5182), and the statute concerning wills provides expressly how alone they may be revoked: Rev. Stats. 1889, sec. 8871. The section last cited provides: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, except by a subsequent will, in writing, or by burning, canceling, tearing, or obliterating the same, by the testator, or in his presence, and by his consent and direction." The doctrine of ademption is treated by the courts as a satisfaction, rather than a revocation, of the legacy. The theory is, that the gift contemplated by the will to take effect after the death of the testator is advanced during his lifetime. The legacy is thus adeemed, or taken out of the will altogether, because the testator has already parted with its control. The subject of the bequest is gone, and the will has nothing to operate upon. Hence the gift must be ejusdem generis, as the bequest in order to effect an ademption. On the same principle, a conveyance by the testator, during his lifetime, of the land previously devised, operates as a revocation of the devise. This results from necessity on account of a failure of the subject of the devise. It cannot be regarded either as ademption or as an exception to the statutory mode of revocation. In neither case is it intended by the courts to set aside the statute or to defeat its provisions.

Real estate is known and transferred by its description, and, in case specific land is devised, a subsequent conveyance of other land does not take the devised land out of the will and cannot effect an ademption of the devise without violating the letter and spirit of the statute. The statute was supposed to subserve a salutary purpose, and should not be disregarded ²⁵³ by the courts, even to carry out the intention of the testator, and to accomplish a more equitable division of his property among his children. As said by the court of appeals of New York, in a case, as in this, in which justice seemed to demand the application of the doctrine of ademption to a devise of land: "A rule of law which has heretofore been sanctioned and relied upon, which is in unison with the spirit and with the sense of our statute, and which offers a safe rule of property, is rather to be followed than to be departed from for reasons moving from the circumstances of a particular case": *Burnham v. Comfort*, 108 N. Y. 541; 2 Am. St. Rep. 462. See, also, *Clark v.*

Jetton, 5 Sneed, 229; Allen v. Allen, 13 S. C. 512; 36 Am. Rep. 716; Weston v. Johnson, 48 Ind. 1.

We are cited to a decision of the supreme court of the state of Virginia which holds that a devise of real estate will be adeemed by a subsequent marriage settlement of other land, of equal value, upon the devisee: *Hansbrough v. Hooe*, 12 Leigh, 321; 37 Am. Dec. 659. In this case one of the three judges dissented. The judge who wrote the majority opinion agreed "that no case had occurred in which the doctrine of ademption of legacies has been extended to devises of real estate," but, he says, "it is equally true that there is no case, in Virginia at least, deciding that the doctrine is inapplicable to such devises." The judge thereupon proceeds to decide the case on principles of equity, notwithstanding a statute of that state in regard to the revocation of wills similar to our own. Tucker, J., who wrote a very able dissenting opinion, shows that the bequest of a legacy may be adeemed by bestowing the gift upon the legatee during the lifetime of the testator. In such case the gift itself is gone, is taken out of the will altogether. In case the land devised is conveyed during the lifetime of the testator, the devise will be ²⁵⁴ necessarily revoked because it has nothing to operate upon. "But," he says, "a gift of other lands cannot operate to adeem since the land devised is left for the will to operate on; nor can it operate to revoke, because revocation can only be according to the statute." In concluding this discussion he says: "We are bound by adjudications in this respect [referring to certain implied revocations] which we may not disregard. But where no precedent commands us to set the statute at defiance, we should steadfastly adhere to its wise and salutary provisions."

So we say in this case. The devise of the tract of land in dispute remained unrevoked by any method provided by statute, and the land which was the subject of the devise remained for the will to operate upon. There could, therefore, have been neither an ademption nor revocation of the devise.

3. It also appears from this record that the conveyance of the one hundred and fifty acre tract by the testator to the devisee was for a valuable consideration and was not made as a portion or advancement. The expressed consideration was ten dollars and an agreement to care for and support the grantor. An attack upon the deed for inadequacy of consideration was defeated: *Keithley v. Keithley*, 85 Mo. 220. As has been said, the doctrine of ademption is founded upon the presumption that

the testator only intended each object of his bounty to receive an equal portion of his estate. The doctrine, therefore, cannot be extended to a payment in satisfaction of a legal obligation, or to property sold by the testator to the devisee for a valuable consideration. It only applies to a portion advanced to the legatee to which he is by nature entitled: 1 Am. & Eng. Ency. of Law, 2d ed., 616, and cases cited.

4. There is no evidence that the conveyance was taken in satisfaction or substitution for the previous ²⁵⁵ devise, assuming that the testator, for the consideration expressed in the will, bound himself to give the legatee the one hundred acre tract. Satisfaction could not be effected without the consent of the devisee, and there was no evidence that he gave his consent: 1 Pomeroy's Equity Jurisprudence, sec. 526.

It follows that both the devise and the conveyance must stand. The judgment is affirmed.

Barclay, P. J., and Robinson and Brace, JJ., concur.

WILLS—ADEMPTION OF LEGACIES AND DEVISES—WHEN OCCURS.—Ademption is the extinction or satisfaction of a legacy by some act of the testator, which indicates either a revocation, or an intention to revoke the bequest: *Burnham v. Comfort*, 108 N. Y. 535; 2 Am. St. Rep. 462. The ademption of general legacies occurs most frequently where the parent makes an advancement to the child by way of marriage settlement or otherwise, and the presumption is, that such advancement is to be in lieu of the legacy: See monographic note to *Hansbrough v. Hove*, 37 Am. Dec. 670. To be considered an ademption of a legacy, an advancement must be made subsequent to the will: *Zelter v. Zelter*, 4 Watts, 212; 23 Am. Dec. 698. Before declaring an ademption the mind of the court should be wholly satisfied as to the meaning of the testator's act: *Burnham v. Comfort*, 108 N. Y. 535; 2 Am. St. Rep. 462. The rule of ademption applies to bequests of realty as well as to bequests of personalty: *Hansbrough v. Hove*, 12 Leigh, 316; 37 Am. Dec. 659. Contra, *Burnham v. Comfort*, 108 N. Y. 535; 2 Am. St. Rep. 462, which latter and the principal case state the better rule.

BORGESS INVESTMENT COMPANY v. VETTE.

[142 MISSOURI, 560.]

WITNESS—WAIVER OF INCOMPETENCY OF.—If a plaintiff takes the defendant's deposition in a case in which he is incompetent to testify, this is an irrevocable waiver of his incompetency, and he may be permitted to subsequently testify in his own behalf on the trial of the cause, whether the deposition is read in evidence or not.

EVIDENCE—AN ACCOUNT-BOOK OF ORIGINAL ENTRIES, fair on its face and shown to have been kept in the usual course of a business, is evidence even in favor of the party by whom it is kept.

EVIDENCE—BOOKS OF ACCOUNT.—A book kept by a party to an action and called a "debit-book," in which was entered the face value of promissory notes, the amount paid therefor, the amount of discount deducted, the names of the parties from whom purchased, and the purchaser, is admissible in evidence, though the entry may in some way extend to the title or ownership of the property.

NEGOTIABLE INSTRUMENTS—PRESUMPTION IN FAVOR OF THE TRANSFEREE.—When a negotiable promissory note is transferred before maturity, the presumption is, that the transferee takes it in good faith and without notice of secret claims or trusts in favor of third parties, or that the note was without consideration.

TRUST DEEDS—RIGHTS OF ASSIGNEE OF NOTES SECURED BY.—An assignee of a negotiable promissory note secured by a deed of trust, acquiring title before maturity, is entitled to enforce such deed of trust free from all defenses except such as can be made against the note. The assignee is not affected by subsequent notice of the defenses or equities of other parties.

NEGOTIABLE INSTRUMENTS.—MERE SUSPICION ON THE PART OF AN ASSIGNEE OF A NEGOTIABLE NOTE that it was made without consideration is not sufficient to deprive him of the right to be treated as a bona fide purchaser thereof. This principle is as applicable to a suit in equity as to an action at law.

DEED OF TRUST—UNAUTHORIZED RELEASE BY A TRUSTEE.—If a note to secure which a deed of trust was given is transferred to a bona fide holder, a release thereafter executed by the trustee and the original payee of the note is without authority and void, and cannot protect a subsequent purchaser of the property having no notice of the transfer of the note before the execution of the release.

Stewart, Cunningham & Elliot, for the appellant.

Lubke & Muench, for the respondents.

564 **BURGESS, J.** This action was begun by plaintiff in the circuit court of the city of St. Louis to enjoin and restrain the defendants from selling, under a power of sale in a deed of trust given to secure the payment of a promissory note, certain real property in that city. A temporary injunction was granted, which upon final hearing was dissolved, plaintiff's bill dismissed,

and judgment rendered against it for costs. From the judgment plaintiff appeals.

The petition averred that plaintiff owned a certain lot of ground in the city of St. Louis, which it acquired on January 23, 1894, from Louis Berneso and others, who acquired it in February, 1893, from William J. ⁵⁶⁵McGrade, to whom it had been conveyed on February 1, 1893, by one Josephine Wellington. That Josephine Wellington was the owner of said property on October 25, 1892, on which day she executed a deed of trust thereon to J. V. Boucher, as trustee, to secure to Alonzo K. Florida payment of her notes of even date, being one principal note of \$5,000, payable in two years, and one principal note for \$3,000, payable in six months after date, one semi-annual interest note for \$240, payable in six months, and three semi-annual interest notes of \$150 each, payable in twelve to twenty-four months after date, said deed of trust being duly recorded in the recorder's office of the city of St. Louis. That on January 14, 1893, Alonzo K. Florida, being then the holder and owner of said notes, conjointly with J. V. Boucher, the trustee in the deed, for value, made to Josephine Wellington a deed of release and quitclaim, whereby they discharged the property from the lien of said deed, which deed of release was also duly recorded, whereby any lien of said deed of trust was alleged to have been fully released. That the defendant Vette, notwithstanding such release, claims to be the owner and holder of one of said promissory notes, of \$3,000, and to be entitled to a lien therefor on said realty, and has procured the appointment of his codefendant, John W. Dryden, as trustee, with the powers conferred by said deed of trust. That said Dryden is advertising the property under said deed of trust for sale on February 1, 1895; that said Dryden, notwithstanding his appointment by the court, has no right in said real estate, and said Vette is not legally nor equitably entitled to have it sold under said deed; but that, nevertheless, the defendants are about to make such sale for the purpose of satisfying said \$3,000 note, and to deliver a deed at said sale which will be prima facie proof of the recitals therein, and will thus create a cloud ⁵⁶⁶upon plaintiff's title to the property, inasmuch as there is nothing upon the records of said city to show that said Vette is not the owner of said note. That said Vette and Dryden have custody and possession of said deed of trust and of the \$3,000 note, but are not in fact the owners thereof, as the same have been paid and satisfied. Plaintiff prayed that defend-

ants might be enjoined from advertising or selling said property, or executing any deed of sale; that the defendants be required to surrender the deed and note for cancellation, to be declared null and void, and for a temporary injunction pending the suit.

On October 7, 1895, defendants entered their voluntary appearance to the cause, and filed their answer and motion to dissolve the injunction, wherein they admitted that defendant Vette was the holder of the \$3,000 note, and that defendant Dryden was appointed and acting as trustee under the deed of trust in question, and all other allegations of the petition were denied. Affirmatively the answer set forth that defendant acquired the note from the legal holder, before maturity, for value, in good faith, without notice of any supposed equities; and that if any releases of the deed of trust were entered on the records, the same are illegal, as not having been joined in, or authorized by, defendant Vette, the legal holder of the note and deed of trust; that the whole amount of said note is still due and secured by said deed.

Florida originally owned the property described in the petition, and on the same day that the deed of trust in question was executed by Josephine Wellington he conveyed it to her.

On the trial, plaintiff showed title to the property to be in it, and also read in evidence the deed of trust which was held by defendant Vette. Also the deed of release, made by Florida and J. V. Boucher, trustee, ⁵⁶⁷ dated January 14, 1893, and recorded January 27, 1893.

For the defendants, defendant Vette was called as a witness. Plaintiff objected to his competency. The attention of the trial court was called to the fact that plaintiff had made him a competent witness by examining him, by way of deposition, in this case. This was admitted by plaintiff, but it was claimed that plaintiff had not offered this deposition, and that in taking the same plaintiff had avoided asking the witness questions concerning this particular deed of trust and note held by Vette. The court overruled plaintiff's objection. The deposition in question was not called for nor read, and the witness testified, in substance, that he was examined as a witness in a deposition taken by Mr. Eliot, attorney for plaintiff, and in that deposition was asked by Mr. Eliot concerning dealings with Florida for some years preceding his death. He identified a paid check of \$2,640, dated November 4, 1892, which on that day he paid to Alonzo K. Florida for the \$3,000 note in question, he having dealt with Florida

for years. This check was in the usual form, on the National Bank of the Republic, St. Louis, signed by Vette, payable to A. K. Florida, indorsed by the latter, and cleared by the St. Louis Clearing House on November 5, 1892.

Vette received the recorder's card for the deed of trust and the \$3,000 note contemporaneously with the delivery of the check. It took about three weeks to have a deed recorded. He had held the note ever since, and for a while had it in bank for collection. He never knew that a deed of release had been made, and had the note in his possession at that time.

Witness did not remember whether he received an abstract of title at the same time. Florida was in the habit of delivering an abstract, and then, later on, borrowing it, in connection with an effort to sell the ⁵⁰⁸ deed of trust. None of the other notes were received by witness. He did not know Josephine Wellington. He bought the note on the strength of Florida's statement. Florida usually wanted cash, and whenever he had the cash in his office he would pay it in that form. Until asked to look it up carefully, he was under the impression that this was a cash payment. He always charged Florida a discount. If Florida had a piece of paper he would bring it in, and either discount the whole of it, or say he wanted so much money. There was no other understanding of any kind about it. If he had known anything of an attempted release, he would have stopped it very quickly. Florida has paid him higher discounts than this. Witness identified a number of checks which Florida paid him from time to time, and explained that they were for different loans and indebtedness. Witness had a lot of Florida's paper, and the latter would come in and take up the notes and securities as they came due. He both loaned him money and bought paper from him. Witness identified the so-called "debit-book" kept by him during a time when he had a brief partnership with his brother, C. W. Vette. The book was kept in his business. He sometimes wrote in it, but chiefly the bookkeeper. The pages of the book were divided into columns, containing respectively the face value of the note, the amount paid therefor, the amount of discount deducted, name of party from whom purchased, and the purchaser. The entry in regard to the present transaction was made by the bookkeeper, Shortal.

Joseph M. Shortal, the bookkeeper of defendant Vette, thereupon testified that as such he entered this Florida transaction in Mr. Vette's book. He also identified the check of \$2,640, Florida's indorsement thereon, and the cancellation upon payment.

He fully ⁵⁶⁹ identified the book in question as having been regularly kept in Mr. Vette's business, and in which witness made most of the entries. The entry was offered in evidence, and received over plaintiff's objection. Witness also explained the meaning of the different columns, and of the entries therein. The book was regularly kept in Mr. Vette's business.

Defendants then offered in evidence the \$3,000 note made by Josephine Wellington, and the indorsement of A. K. Florida, to which plaintiff did not object. It was protested for nonpayment on April 28, 1893, but the notary's certificate of the protest was excluded on objection.

Defendants rested, and plaintiff in rebuttal proved that good real estate loans, at the date of this transaction, could have been had in the city of St. Louis at the rate of six per cent per annum, and that Mr. Vette, when asked after Florida's death how he had acquired this note, had made the statement that he gave Florida \$2,500 in cash for it, but had kept no record of it. The witness, Charles Hewitt, called by plaintiff to prove that Mrs. Wellington had not received full value for the note, admitted, on cross-examination, that Mr. Florida's standing as a real estate dealer and agent in the city of St. Louis was good in October and November, 1892; that he never heard anything against him, nor of anything wrong until he died by his own hand.

The first assignment of error is with respect to the ruling of the court in permitting the defendant to testify, over the objection of plaintiff, as a witness in his own behalf, as to the acquisition of the note in question from A. K. Florida, who was dead at the time of the trial. It is conceded by plaintiff that defendant was not disqualified as a witness for all purposes, and that he was competent to testify to any facts within his ⁵⁷⁰ knowledge touching the issues in the case which did not involve the terms of the transaction between himself and Florida, but that as to matters involved in such transaction he was not competent to testify. Unless the incompetency of defendant Vette to testify as to matters between himself and Florida, which occurred at the time he acquired the note from him, was in some manner waived by plaintiff, it is perfectly clear that he was not competent to testify with respect thereto: Rev. Stats. 1889, sec. 8918. But it is contended by defendants that all objections as to his competency were waived by plaintiff when it took his deposition in this case. The deposition was not read on the trial, and it is claimed by plaintiff that, in taking the same, plaintiff avoided asking the witness questions concerning this particular deed of

trust and note held by him. But Vette testified on the trial, in effect, that in the deposition he was asked by the attorney for plaintiff concerning dealings with Florida for several years preceding his death, and that he identified the check for \$2,640 dated November 4, 1892, which he on that day paid Florida for the note in question. It is said in *Tomlinson v. Ellison*, 104 Mo. 114: "The fact that plaintiff had taken defendant's deposition in the same action amounted to a waiver of any alleged incompetency on his part." While it was said in *Ess v. Griffith*, 139 Mo. 322, that "the statement of the legal principle quoted was not necessary to a decision of the case, and can only be regarded as the dictum of the judge who wrote the opinion," it was ruled that where the deposition of a party to a suit, who was at the time incompetent to testify as a witness in his own behalf, was taken by the adverse party, that the question of his incompetency was by reason thereof waived, and that he then became a competent witness in his own behalf in the trial of the cause, whether the deposition was read ⁵⁷¹ on the trial or not. It was said: "Plaintiff had the right to examine defendant Pierce as a witness, but in doing so he waived the right to insist on excluding him when called by defendant. This would certainly be so as to all matters concerning which he was examined by plaintiff. He cannot, in fairness, be allowed to assert his competency, if his evidence is found to be favorable, and deny it if found to be unfavorable": *Estate of Soulard*, 141 Mo. 642. "A waiver of objection to competency made at one stage of the taking of testimony is a waiver during the whole progress of that proceeding": *Rapalje on Witnesses*, sec. 178, and authorities cited in *Ess v. Griffith*, 139 Mo. 322. It would seem from these authorities and upon principle as well, that when plaintiff took the deposition of Vette and filed it in the cause, it thereby waived his incompetency as a witness for all purposes, whether the deposition was read upon the trial or not.

Complaint is made by plaintiff of the action of the court in admitting in evidence over the company's objection the so-called "debit-book," kept by defendant Vette in his business. Plaintiff insists that while books of account kept by a party himself or by his clerk are under some circumstances admissible in evidence in his behalf, they are not so admissible when the party himself is disqualified as a witness, unless the action is one for the recovery of a sum or balance due on account. *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 32 Am. St. Rep. 600, was an action to recover overpayments alleged to have been made by the plain-

tiff to the defendant. The facts, as stated by Black, J., who wrote the opinion of the court, were about as follows: Defendant had a contract with plaintiff whereby he was to receive a certain price for hauling wheat and flour to the mill and a certain price per barrel and sack for hauling flour and other mill products from the mill to other points. Books ⁵⁷² were kept at the plaintiff's warehouse showing the wheat and flour received and shipments made, and the amount of hauling done by defendant. The orders were entered in the shipping book by Timmons, the shipping clerk, or by Mr. Warren, who had a general supervision over all the business of the warehouse. The orders were then copied into a small hand-book for the use of the foreman, who delivered the articles to defendant's teamsters, made a note of the fact, and returned the book to the clerk, who made entries on the shipping-book, showing, among other things, the delivery of the articles to defendant. Warren testified that he always compared the orders with the book when made up, and then returned the orders to the mill office; that he knew the flour and other mill products were delivered to defendant from the information received from the small book, and in some cases from personal observation. These returned orders were lost or destroyed. Timmons, the shipping clerk, was not called as a witness. Under these facts, after an elaborate review of the authorities, it was held that the shipping-book should have been received in evidence. The court said: "An account-book of original entries, fair on its face, and shown to have been kept in its usual course of business, is evidence, even in favor of the party by whom they are kept." The same conclusion was reached in *Robinson v. Smith*, 111 Mo. 205; 33 Am. St. Rep. 510; and in *Seligman v. Rogers*, 113 Mo. 642. The rule seems to be that when book entries are made by a party himself, or by his clerk, in the usual course of his business, being contemporaneous with the fact, they are admissible in evidence, and this we think is true even though the entry be made by the party himself, or may in some way extend to the title or ownership of the property. Vette's incompetency as a witness being waived by plaintiff, he was competent to testify to the ⁵⁷³ identity of the "debit-book," and when it was shown by Shortal, the bookkeeper of Vette, in connection therewith, that he entered the Florida transaction in the book, and identified it, our conclusion is, that the "debit-book" was properly admitted in evidence.

Another contention is, that where issues in a case involve the bona fides of one in whose possession a promissory note remains,

upon allegations to that effect traversed by the other party, the want of consideration in the making of the note, connected with circumstances of suspicion calculated to put the party upon inquiry as to equities, is material to the case, and especially is this so where the proceeding is one in equity, as in this case. It is well settled that when a negotiable promissory note is transferred before maturity, the presumption is that the transferee or assignee takes it in good faith and without notice on his part of secret claims or trusts attached thereto in favor of third parties, or that the note was without consideration. And where the note is secured by a deed of trust, as in the case at bar, the deed of trust passes with the transfer of the note, as incident thereto, free from any and all defenses except such as could be made against the note. Under such circumstances, the holder is not affected by subsequent notice of the equities or defenses of other parties: *Hagerman v. Sutton*, 91 Mo. 519; *Mayes v. Robinson*, 93 Mo. 114; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375; *First Nat. Bank v. Rohrer*, 138 Mo. 369. Nor will mere suspicion alone that the note is without consideration brought home to the transferee before he acquires the note be sufficient to defeat a recovery upon the note by him. Bad faith alone upon the part of the holder in taking the note will not defeat a recovery by him against the party thereto: *Hamilton v. Marks*, 63 Mo. 167; *Goodman v. Simonds*, 20 How. 343; *Johnson v. McMurray*, 72 Mo. 278; *Mayes v. Robinson*, 93 Mo. 114. And we see no reason ⁵⁷⁴ in principle why the same rule should not apply when the proceeding is one in equity, and not an action of law upon the note.

There remains but one question to be disposed of which we think necessary to consider, and that is the effect of the release of the deed of trust by the trustee therein named, and Florida, the payee of the note, after he transferred it to Vette, upon the rights of plaintiff, the company being an innocent purchaser of the real property covered by the deed of trust after the recording of the release. It is claimed by plaintiff if the lien of a deed of trust is released by the trustee and the payee of a note, a presumption of authority and validity exists in favor of an innocent purchaser of the real property covered by such deed of trust who buys after the release is recorded, and that he who claims the deed of release to be void must prove the facts which result in that conclusion. Conceding this proposition to be true, that presumption was overcome when it was shown that Vette acquired the note for value from Florida before it became due, for the

deed of trust by which its payment was secured passed to Vette as incident to the note, and thereafter neither Florida, nor the trustee Boucher, nor both of them together, had any power or authority to release the deed of trust without his consent.

Therefore, the execution of the release by the trustee and Florida after Florida had sold the note to Vette was without authority and void: *Lee v. Clark*, 89 Mo. 553; *Hagerman v. Sutton*, 91 Mo. 533; *State Bank v. Frame*, 112 Mo. 514; *Feld v. Roanoke Inv. Co.*, 123 Mo. 603; *Kelly v. Stead*, 136 Mo. 430; 58 Am. St. Rep. 648.

The result is, that the judgment of the circuit court must be affirmed, and it is so ordered.

Gantt, P. J., and Sherwood, J., concur.

WITNESSES — OBJECTION OF INCOMPETENCY — WHEN WAIVED.—Objection to the competency of a witness must be made, if it is known, before his examination in chief, or, at least, cannot be made after his cross-examination: *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804, and note; *Andre v. Bodman*, 13 Md. 241; 71 Am. Dec. 628, and note.

EVIDENCE — ACCOUNT-BOOKS.—An account-book of original entries, fair on its face and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the party by whom it is kept: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 33 Am. St. Rep. 600, and note; *Heiskel v. Rollins*, 82 Md. 14; 51 Am. St. Rep. 455, and note; *Robinson v. Smith*, 111 Mo. 205; 33 Am. St. Rep. 510.

NEGOTIABLE INSTRUMENTS — RIGHTS OF BONA FIDE PURCHASER—PRESUMPTION.—A purchaser of notes before maturity is presumably an innocent purchaser, and he cannot be prejudiced, nor his title invalidated, by subsequently learning that the maker thereof has been a fraud feisor: *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375. The rights of such holder are to be determined by the simple test of honesty and good faith, and not by speculative views as to his diligence or negligence: *Cheever v. Pittsburgh etc. R. R. Co.*, 150 N. Y. 59; 55 Am. St. Rep. 646, and note; monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 309-326. An innocent holder for value and before maturity of negotiable notes secured by mortgage or vendor's lien takes the notes, as well as the security, freed from equities arising between prior holders and the mortgagor and mortgagee, or the vendor and vendee: *Nashville Trust Co. v. Smythe*, 94 Tenn. 513; 45 Am. St. Rep. 748, and note.

TRUSTS—UNAUTHORIZED ACTS OF TRUSTEE—DUTY OF PURCHASERS.—Persons dealing with a trustee must take notice of the scope of his authority, and may be prejudiced by relying upon an unauthorized release of a mortgage, which release is executed by the trustee: *Kirsch v. Tozler*, 143 N. Y. 390; 42 Am. St. Rep. 729. So an unauthorized release of a mortgage after the assignment of the notes secured thereby to a bona fide purchaser, cannot prejudice the latter even as against an innocent purchaser relying upon the release: *Demuth v. Old Town Bank*, 85 Md. 315; 60 Am. St. Rep. 322. On the general subject see monographic note to *Day v. Brenton*, 63 Am. St. Rep. 467-477.

CASH v. LUST.

[142 MISSOURI, 60.]

WILLS—COST OF CONTEST.—The contestant of a will cannot be required to give security for the costs as a condition to prosecuting such contest.

WILLS.—WHERE A WILL IS CONTESTED ON TWO GROUNDS, and the jury find in favor of the contestants, but it cannot be told upon which ground, the verdict must be set aside, if there was a failure of proof upon either ground.

WILLS.—THE TEST OF COMPETENCY is only that the testator understood the business about which he was engaged when he had his will prepared and executed, knew the persons who were the natural objects of his bounty and understood his relation to them, and knew what property he had and the disposition he desired to make of it.

WILLS.—WANT OF TESTAMENTARY CAPACITY on the part of a testator is not established by evidence showing that when his will was made he was eighty years of age, of violent temper and passions and strong prejudices, that his health was bad, that he developed a mania for praying and prayed respecting the will in question, that he professed to have had a communication from Jesus Christ during the year the will was executed, that he abruptly changed subjects in conversation, and often, after talking a little, broke down and cried like a child over real or fancied reverses, where it is also proved that he attended to his business until his death, and, in doing so, exhibited average mental capacity.

WILLS—BURDEN OF PROOF.—One who claims that a will was the result of undue influence exerted on the mind of the testator must satisfy the jury, by substantial evidence, that the will was the product of such influence.

WILLS.—UNDUE INFLUENCE on the part of two sons over their father, such as must invalidate his will, is not established by evidence showing that they had almost entire control over his business, and that he was unwilling to do anything respecting it without their presence and their advice, that they advised against the marriage of one of their sisters, and the father thereafter opposed it, where it appears that these two sons were not present at the execution of the will and obtained no special advantage by it, except that they profited equally with five other children from his practically disinheriting his two remaining children, and the father, when making the will, stated the reason why he did not divide the property equally among all his children.

J. H. Blair & Son and D. A. Ball, for the appellants.

Hostetter & Jones and Clark & Dempsey, for the respondents.

635 MacFARLANE, J. This is a suit contesting the will of John C. Lust, deceased. It is prosecuted by Irene M. Cash, a daughter of deceased, and her husband, Paul Cash, and Harry Litter, a grandson of deceased, by his guardian, against nine defendants, sons and daughters of deceased.

The invalidity of the will is sought to be established on two grounds: 1. Mental incompetency of the testator; and 2. That it

was made through the undue influence of defendants Christian G. Lust and Samuel Lust. The answer admits the due execution of the will, denies the other allegations of the petition, and states that the paper writing is the last will of the deceased.

On the trial defendants made proof of due execution and attestation of the will and offered evidence that the testator, at the time of executing it, was of ⁶³⁶ sound mind, and read the will in evidence. By item 1 deceased directs the payment of his debts. Item 2: His widow is given the home farm and household and kitchen furniture for life. Item 3: Plaintiff Irene Cash is given the sum of one hundred and fifty dollars. Item 4: Plaintiff Harry Liter is given one hundred dollars. Item 5: The balance of his property is divided equally among his other nine children, the defendants herein. Item 6: At the death of his wife the property given her for life is to be divided among the defendants. Christian G. Lust is named as executor.

Evidence bearing upon the mental condition of deceased and of the influence said defendants Christian and Samuel Lust had over him was then offered by the parties. The evidence will be stated in the opinion. At the close of all the evidence defendants asked, and the court refused to give, the following instructions: "1. The court instructs the jury that under the evidence in the cause their verdict must be for the defendants. 2. The court instructs the jury that there is no evidence of the unsoundness of testator's mind at the time of the execution of the will; therefore as to that issue your verdict must be that the paper read is the will of the deceased, John C. Lust; 3. The court instructs the jury that there is no evidence in the cause as to undue influence upon the part of Christian G. Lust and Samuel Lust upon the mind of the testator; therefore as to that issue your verdict must be to sustain the will; 4. The court instructs the jury that there is no evidence that the testator was of unsound mind and for that reason incapacitated to make a will; neither is there any evidence in the cause of undue influence having been made upon the mind of the testator; your verdict must therefore be that the paper read to you ⁶³⁷ in evidence is the last will and testament of John C. Lust."

The issues were submitted upon instructions given by the court. The verdict was that the paper writing was not the will of John C. Lust. Judgment was entered rejecting the will and defendants appealed.

1. At some time before the trial defendants filed a motion asking a rule on plaintiffs to give security for the costs. This

the court refused, on the ground that security could not be required as a condition to prosecuting a suit contesting a will. Defendants complain of this ruling of the court. The probate of a will in common form by the probate court is, in effect, interlocutory, and only becomes final and conclusive at the expiration of the time parties in interest are allowed in which to contest its validity in the circuit court. When a contest is entered, the circuit court thus acquiring jurisdiction should proceed, as required by statute, to determine whether the paper writing in question is, or is not, the will of the decedent. Contestants will not be allowed to dismiss the proceedings, for they are in rem and all persons interested, whether as contestants or proponents, are entitled to have the formal and conclusive judgment of the court either rejecting or confirming the will: *McMahon v. McMahon*, 100 Mo. 97, and cases cited. It follows that contestant cannot be required to give security for the costs. It has been held by this court in a recent case that the cost of making the formal proof of the due execution of the will, whether in solemn or common form, may be paid out of the estate of the decedent, and in case of a contest it is the duty of the executor named to make this proof if none of the parties interested do so: *In re Soulard's Estate*, 141 Mo. 642. By the formal proof is meant such as is required to be made *ex parte* in the probate court: Rev. Stats., secs. 8880, 8884. There can be no doubt that ⁶³⁸ contestants would have the right to withdraw their objections at any time before the case is submitted, and thereby relieve themselves of costs that may subsequently accrue, but they cannot be forced to do so by putting a condition upon their right to contest, such as requiring them to give security for the costs.

2. The important and troublesome questions in this case are, whether there was evidence of mental incapacity or of undue influence, which authorized a submission of these issues to the jury. Defendants, by separate requests, asked the court to instruct the jury that there was a failure of proof on each issue. These instructions were refused and both issues were submitted to the jury. It cannot be determined, therefore, whether the jury found against the validity of the will on the ground of incapacity or of undue influence. If, therefore, there was a failure of proof upon either or both, the judgment will have to be reversed.

3. We have carefully read the evidence offered by plaintiffs, for the purpose of proving want of sufficient mental capacity on the part of the testator to make the will, and are of the opinion that it wholly fails of its purpose.

Before entering into a review of the evidence on the issue of incompetency, it may be well to state that the test of competency is only that the testator understood the business about which he was engaged when he had his will prepared and executed, knew the persons who were the natural objects of his bounty, and understood his relation to them, and knew what property he had and the disposition he desired to make of it. With a capacity reaching this standard and under a free exercise of it, the courts will not interfere with his right to dispose of his property according to his own will, however unjust the disposition may appear: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Maddox v. Maddox*, 114 ⁶³⁹ Mo. 35; 35 Am. St. Rep. 734; *McFadin v. Catron*, 120 Mo. 268; 138 Mo. 197.

It appears from the statement of respondent, as well as from the undisputed evidence, that the testator John C. Lust was, at the time of making his will, about eighty years of age. His will was made October 4, 1893, and he died in August, 1894. He was a farmer and had lived upon a farm near Spencersburg, Pike county, for many years. He left an estate valued at about seventeen thousand dollars. He had been all his life a close, hard-working man, and required all his children to work also. He was a man of violent temper and passions, and strong prejudices. During the last years of his life he was in bad health, some of the time confined to his bed. Respondents' counsel state the evidence bearing on the question of incapacity as follows: "But in his latter years, as his mind weakened, he developed a mania for praying, and claimed that he had prayed to God unceasingly in regard to the will now being contested. He also professed to have had communication from Jesus Christ while on a sick bed in 1893, the year the will was made. He claimed Jesus Christ came to him while sick, and said: 'Old man Lust, get up and walk,' and he at once got better. It is also in evidence that he would abruptly change subjects when in conversation, thus showing that he lacked continuity. That he was very much diseased with a combination of ailments and complained of his head. Consulted many doctors, and was confined to his bed a great deal the last year or so of his life. Two witnesses testified that the old man got lost twice in the little town of Frankford in 1893. That was his nearest railroad station and had been his trading point for forty years. Other witnesses testified that he had in 1893 developed into the habit of talking a little, and then breaking down and crying like a child over some ⁶⁴⁰ real or fancied business reverse. Or if anything went wrong about the work he

would talk and pray and cry over it by turns. These actions were never known to exist in former years. In fact, his previous life had been just the opposite."

Going a little more in detail, one witness who stated the fact that testator cried after "talking a little" was John T. Hutchinson. He testified to having seen him in Bowling Green in January or February, 1893. "I asked the old gentleman how he was getting along. He said not very well, and went on to tell me about his boys. Said he had sold them some land on the prairie, and they hadn't paid him any money. That he had a note and deed of trust on the land and he had to pay the taxes, and broke down completely and commenced crying and stopped and waited awhile and then proceeded, until I finally walked off and left him. . . . He told me the boys had borrowed some of the girls' money that they had worked hard for, and gone through with it. I talked with him about half an hour, and his memory seemed to be good." In regard to his getting lost in Frankford, Joseph Thompson testified in chief that several persons were standing near the butcher shop. Testator came along carrying a satchel. "He asked some of us the way home. Some of us told him. Some of us boys was laughing about it, and said the old man must be full." On cross-examination the witness was asked if he did not think the old man asked the question more through mischief than anything else. He answered: "I expect it was that way. I took it that way." The evidence of the two subscribing witnesses and the lawyer who wrote the will, and a number of the neighbors of the deceased bore testimony that he was a man of average mental capacity and generally superintended his own business when he was physically able to do so until his death. On the day of his death he ⁶⁴¹drove to town and transacted, intelligently, some business, and as he was returning home his team became frightened and ran, and he was thrown from the wagon and killed.

That testator had peculiarities and eccentricities cannot be disputed. That he had a violent temper and strong prejudices the evidence clearly shows. That he had become much reduced by disease and age is also true. But we see nothing in the evidence that tends to prove such mental weakness or decay that would render him incompetent to intelligently dispose of his property by will. Some of the ablest men the world has produced have prayed God for guidance in all things, and many believe in Divine Providence and visitations. That the testator prayed God's guidance and direction in making his will surely does not tend to

prove his mental incapacity. The emotion displayed when talking of the failures in life of some of his sons shows possibly a weakness of old age and infirmity coupled with an emotional nature, but nothing more.

But, taking the statement of the evidence as made by counsel for respondents, there is nothing tending to prove that the testator did not understand the business about which he was engaged when he had his will prepared and executed; that he did not know his children and grandchildren who were the natural objects of his bounty, or that he did not know what property he had and the disposition he intended to make of it. The court committed error, therefore, in refusing to give the second instruction asked by defendants.

4. On the question of undue influence there is more trouble, for that is a matter which can seldom be proved by direct evidence. The two sons who are accused of unduly influencing the testator in the disposition ⁶⁴² of his property were thirty-eight and forty years of age, respectively, were unmarried and lived on the farm with their father. They had been fairly prosperous in business, had for some years assisted their father in the management of his affairs, and had the farm leased for the year 1893, in which the will was made. In the circumstances it was but natural that their father should look to them for assistance and should consult them on important business matters. They naturally had some influence over him, and had also the opportunity of improperly exercising it in the matter of disposing of his property by will. On the other hand, the evidence shows that the testator had, when in good health, been a man of strong will power and was not subject to the influence of others. The will itself, except as to the provisions made for plaintiffs, is just and reasonable. The two sons, Christian and Samuel, secured to themselves no advantages over the other seven children of the testator. There is no direct evidence which tends to prove that these two sons desired the disinheritance of plaintiffs, or even suggested it to their father. The burden of proof was therefore on plaintiff to satisfy the jury, by substantial evidence, that the will was the product of the undue influence of these two sons.

The evidence which contestants rely upon as tending to prove undue influence is detailed in their statement as follows: "It is in evidence that Chris and Sam were overheard by plaintiff, who was in an adjoining room, on one occasion talking against plaintiff and her sweetheart, Paul Cash, and afterward the old man

told her that Paul's attentions to her were raising a contention with the boys, and he also stated to witness Jones that Sam and Chris had told him of Paul Cash's alleged brags that now he had gotten the old man's girl he was going to get some of his money, but he would ⁶⁴³ see that he didn't. The son Sam brought his father from home in a buggy on the occasion of making his will. They went from home to the Audrain county farm near Farber, where the other children lived, and stayed all night. Started the next morning to Bowling Green, where the will was made, stopping an hour or more at Farber. They (Sam and his father) stayed at Gilbert Neffler's over night while in Bowling Green. Neffler was a German friend of Lust's and a witness for defendants. Witness J. H. Blair, also attorney for defendants, prepared the will. Sam and Chris both deny any knowledge that the will was made until after the old man's death. It is also abundantly shown in evidence that Chris and Sam had almost complete control of the old man's business during the last two or three years before his death. Ed Biggs, county clerk, testified that he went to the Lust home to buy some stock and the old man wouldn't talk trade because he said Sam and Chris were not at home. And witness Jesse B. Jones testified that Sam sold him the old man's wheat crop in 1893 and received the money therefor, and witness Valentine Tapley testified that the old man deferred to Sam and Chris, particularly Chris, as to all business."

The conversation between the father and sons, referred to by plaintiffs, was before the marriage of Irene to Cash. She testified: "They would keep telling father that he [Cash] was no account and was not fit for anything, and all like that." The evidence tends to prove that testator at first consented to the marriage of his daughter Irene, to Cash, but afterward changed his mind and bitterly opposed it. Two witnesses testify that on the day the will was written Mr. Lust gave, as his reason for the small provision made his daughter Irene, that she cursed and mistreated him, and that she and her husband were not worthy of ⁶⁴⁴ any property. "That he was almost sure that they would not take care of it, and would squander it, and that he would not make plaintiff equal with the balance." That Paul Cash had made his brags that he had got the daughter and would get a part of the estate. Plaintiff testified that she "never cursed her brother that she knew of." And Cash, while he testified in the case, did not deny making the remarks attributed to him. Both sons testified that they did not know a will

had been made until after their father's death. The motive of the testator for the small portion given Mrs. Cash is very clearly shown. Nothing appears in the conduct of the two sons which was calculated to create the prejudice and want of confidence in the son in law, Cash, except the opposition they made to the marriage. That opposition may have been for good cause, at any rate it had no reference to the subsequent act of the father in making the will. A brother could surely advise against what he regards as an improvident marriage of his sister, without having imputed to him an intention of thereby securing her disinheritance. The fact that the father had confidence in his sons without some proof that the confidence had been abused, or that the sons had influence over the father without some proof that the influence had been unduly exercised, affords no reasons for defeating the will. Mr. Lust had the right to dispose of his property as he did, though he may have been actuated by unjust prejudices. The presumption is in favor of the validity of the will, and plaintiffs have offered no evidence tending to rebut that presumption.

No issue was made on the due execution of the will. Evidence of the attesting witnesses and others is sufficient to authorize its probate. The judgment is therefore reversed, and the cause is remanded with directions to enter a proper judgment confirming the will.

All the judges of this division concur.

WILLS—TEST OF TESTAMENTARY CAPACITY.—Testamentary capacity in a testator involves sufficient mental capacity to comprehend the condition of his property, his relations to the persons who are or should be the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to one another, and to be able to form some rational judgment in relation to them: *Hall v. Perry*, 87 Me. 569; 47 Am. St. Rep. 352, and note. The fact that a testator, when he made his will, was seventy-five years of age, weak and feeble, nervous, irritable, absent-minded, and of feeble memory, does not necessarily establish his want of testamentary capacity: *In re Cline's Will*, 24 Or. 175; 41 Am. St. Rep. 861, and note.

WILLS—UNDUE INFLUENCE—WHAT IS—BURDEN OF PROOF.—Undue influence in the execution of a will is never presumed. The burden of proof to show it is generally on the contestant: *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828, and note; *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665. As to what constitutes undue influence sufficient to invalidate a will see monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691; *Henry v. Hall*, 106 Ala. 84; 54 Am. St. Rep. 22, and note; *Knox v. Knox*, 96 Ala. 495; 36 Am. St. Rep. 235.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

ERWIN v. MAYOR OF JERSEY CITY.

[60 NEW JERSEY LAW, 141.]

OFFICERS—DE FACTO—VALIDITY OF ACTS—POWER TO APPOINT.—If an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so.

OFFICERS—APPOINTMENT—VETO OF MAYOR.—Under a city charter giving power to the mayor to veto the "acts" of any municipal board and requiring all ordinances and resolutions to be sent to him for consideration, the approval of the mayor is not required to validate an appointment to office by a municipal board. "Acts" which the mayor may veto or approve are those of a legislative character only.

OFFICERS DE FACTO—RIGHT TO COMPENSATION.—One who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover the compensation provided by law for such services during the period for which they have been rendered.

C. L. Corbin, for the plaintiff in error.

W. D. Edwards, for the defendants in error.

142 **MAGIE, C. J.** The record returned with this writ disclosed a judgment in favor of the city of Jersey City (which was the defendant below) and against Erwin (who was plaintiff below), upon the verdict of a jury. The bills of exception show that the verdict was directed by the trial judge. Erwin duly excepted to that direction and has assigned error thereon.

The issue in the cause had been previously tried by the same judge without a jury, and his finding was in Erwin's favor. A rule to show cause why that finding should not be set aside was allowed and afterward made absolute. The opinion of the late chief justice (with whom Mr. Justice Garrison concurred), and the dissenting opinion of Mr. Justice Dixon, are reported in *Jersey City v. Erwin*, 59 N. J. L. 282.

The cause again going down for trial, the issue was submitted to a jury, by consent of both parties, upon the same evidence which had been presented to the trial judge upon the former trial, and on which he had found in Erwin's favor. In conformity with the views expressed in the prevailing opinion of the supreme court, a verdict was directed in favor of the city.

The pleadings disclose that Erwin's action was brought to recover the compensation attached to the office of corporation attorney of the city of Jersey City for the period of three months.

At the trial Erwin claimed: 1. That he had been duly appointed to that office; and 2. That if not so appointed, he filled the office *de facto* and duly performed its duties for the period for which he claimed compensation.

The prevailing opinion of the supreme court indicated two grounds upon which it was concluded that the finding in Erwin's favor, upon the same evidence which is now before us, could not be supported.

¹⁴³ In the first place, it was determined that the evidence showed that Erwin had not become corporation attorney *de jure*, because, conceding that the board of finance of Jersey City had power to appoint that officer, one of the members of that board, who acted with it and whose vote was necessary to make a valid appointment, was afterward adjudged upon *quo warranto* to have been a usurper in office and was ousted therefrom. It was determined that the principle applicable in such a case was that a *de facto* board could not create a *de jure* officer by appointment.

In the second place, it was determined that Erwin, although admitted to have been corporation attorney *de facto* during the period in question, could not recover the compensation attached to the office, because there was, during that period, another corporation attorney *de facto*, and that, under such circumstances, neither *de facto* officer could maintain an action for such compensation.

The situation of the case before us practically compels a re-

view of the decision of the supreme court. Passing, for the present, the conclusion of that court first above indicated, I find myself unable to discover, after a careful examination of the evidence, anything to support the conclusion secondly above indicated.

As before stated, the supreme court determined that Erwin had become corporation attorney de facto. In that conclusion I entirely concur. By the provisions of section 1 of "An act concerning the appointment of municipal officers and boards in cities," approved March 11, 1893 (Pamph. Laws, p. 224), it was enacted that the law officers of cities of the first class (of which Jersey City is one) should be appointed by the board having charge of the financial affairs by a vote of not less than two-thirds of all the members. In Jersey City, the board pointed out by these provisions as intrusted with the appointing power of law officers was the board of finance, and that board, on December 27, 1893, while the act was still in force, appointed Erwin corporation attorney for the time limited by law.

¹⁴⁴ It is, however, contended, on the part of the city, that Erwin not only did not acquire by this appointment a title to the office de jure, but none de facto.

This contention is first put upon the ground that the act under which the board of finance made the appointment was not within the constitutional power of the legislature to enact.

The successful maintenance of this proposition might affect Erwin's title as an officer de jure, but, in any judgment, would be without effect upon his position as an officer de facto, for at the time the board of finance appointed him corporation attorney, the validity of the act of the legislature had never been judicially questioned. It conferred apparent authority to make such an appointment. It is admitted to be difficult, if not impossible, to express in a single formula what constitutes a public officer de facto. The masterly and exhaustive review of the adjudged cases on the subject made by Chief Justice Butler, in his opinion in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, plainly discloses the difficulty of an exact definition, including all circumstances in which the law, because of public convenience and necessity, treats one as a public officer, although not such, and calls him an officer de facto. I deem it unnecessary to prolong this opinion by any account of my own consideration of the subject, for the circumstances of the case before us do not leave it upon any debatable ground. It plainly falls within at least one of the classes defined by Chief

Justice Butler, to which the doctrine derived from the cases he reviewed was deemed by him to be applicable. Other cases justifying the same conclusion may be found collected in 5 American and English Encyclopedia of Law, 96. The definition may, I think, be thus stated: When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so.

¹⁴⁵ Applying this definition to the facts before us, we find that Erwin unmistakably acquired the position of corporation attorney de facto, for the board of finance had apparent authority to appoint to that office and exercised that authority, and Erwin accepted the appointment. It is beyond doubt that his acts on matters in which the corporation attorney could act would bind the city and parties dealing with the city.

It is, however, further contended that the appointment of Erwin by the board of finance gave him no apparent title to the office of corporation attorney, because, as is claimed, that action required the approval of the mayor of Jersey City, which approval, it appears, was refused. This contention is put upon the provisions of section 19 of "An act for the government of cities of this state," approved April 6th, 1889: Pamph. Laws, p. 187. Although this act has been pronounced by this court to be a general law, it is called in the brief of counsel the new charter of Jersey City. Assuming, although there is no proof of it, that the act in question is in force in Jersey City, we will consider the contention thus made.

By the provisions of the section above referred to, the mayor of the city is given authority to veto the "acts" of any board of the city, and it is required that copies of all resolutions and "other matters" shall be furnished to the mayor for consideration, and the board is empowered to pass any vetoed resolution or other matter over the mayor's objections, by a two-thirds vote. It is insisted that a resolution appointing to office is subject to the mayor's veto.

If a literal construction be given to the provisions of the section thus appealed to, it is obvious that the business of any municipal board will not only be hampered and delayed, but practically be rendered impossible to be performed. Resolutions to

approve minutes, to lay on the table, to postpone, to adjourn, and numberless others, are resolutions expressing acts of such boards. If all such acts are to be presented to the mayor, and only be effective upon his approval or their passage over his veto, the business of the board could not be ¹⁴⁶ done. It is so incredible that the legislative intent was to produce such a result that a restricted construction of these provisions, consistent with their practical operation, should be adopted if possible.

A question identical with that thus presented was considered by the supreme court in *Haight v. Love*, 39 N. J. L. 14. By the provisions of a section of a former charter of Jersey City, the mayor was given power to veto the "action" of any municipal board, and all ordinances and resolutions were required to be sent to him for consideration. If any were vetoed, it was provided that the action resolved upon or ordained should be void, unless such board should sustain it by a two-thirds vote at its next meeting. The point presented in the case was whether the appointment, by the board of finance, of a city collector required to be presented to the mayor for his approval. The opinion of the court was delivered by Mr. Justice Dixon, who justly pointed out the impracticability of a literal construction of those provisions, and who concluded that the actions which the mayor might approve or veto must belong to the class of acts usually performed by such bodies by resolutions or ordinances, viz., acts of a legislative character. As appointments to office were not of that character and were not usually made by resolution, but rather by ballot or viva voce, the legislation then under consideration was construed as inapplicable to acts of such boards appointing to office, and it was held that such acts did not require the approval of the mayor.

With the views expressed in that case I am in entire accord, and I think them applicable to the statutory provisions now under consideration. The absurd result of a literal construction of those provisions tends to induce the belief that such construction was not within the legislative intent, and the fact that it is required that the mayor is to be informed of "resolutions and other matters" for consideration in respect to his approval or veto, justifies the conclusion that the "acts" which are thus to be submitted to him for approval are only such as are usually performed by such bodies by resolutions ¹⁴⁷ or other similar evidences of action. "Other matters" is a phrase not very aptly chosen, but, in my judgment, it can only mean matters of a similar character to resolutions, of which I know none but or-

dinances. The result is, that the power to appoint a corporation attorney, if only apparent, was conferred upon the board of finance, and their appointment did not require the mayor's approval.

While thus concurring in the view of the supreme court that Erwin became corporation attorney de facto, I am unable to agree with their conclusion that, during the period Erwin was such corporation attorney, there was another corporation attorney de facto. In my judgment, the evidence affords no ground for such conclusion.

It appears by the uncontradicted evidence that Spencer Weart had been in the service of the city as corporation attorney. His term had expired in April, 1893, but, no successor having been appointed, he was holding over by virtue of his previous appointment. As has been stated, the board of finance appointed Erwin to that office on December 27, 1893. On December 29, 1893, Weart sent to Erwin a letter describing the legal business of the city in his hands, and inclosing papers relating to actions against the city then pending. It closed with the following words: "As far as I know, these are all the facts and papers which I can give, relating to the office of corporation attorney of Jersey City, which would be of assistance to a corporation attorney of said city." On December 30, 1893, Weart sent Erwin another letter, inclosing a summons relating to another pending action against the city. On the same day the city clerk sent Erwin four summonses in actions against the city, which he had received from Weart, whom he described as "formerly corporation attorney."

From these acts it is obvious that Weart, if he had any claim to the office of corporation attorney de jure by reason of any defect in Erwin's title, abandoned to Erwin the position de facto. The evidence is clear that Erwin assumed the position and performed its duties.

¹⁴⁸ But it is argued that Weart afterward became corporation attorney de facto, and such was the conclusion of the supreme court. This contention is put upon the following facts: On January 9, 1894, the mayor of the city notified Weart by letter that he had received a resolution of the board of finance purporting to appoint a corporation attorney, which he had not yet approved, and requesting Weart to continue to act as corporation attorney for a time. To this letter Weart replied by letter containing the following: "I do not want to take up the work of the office of corporation attorney, and if I do so it will

be a secondary matter to my own matters, as I intend to command my own time and give the first attention to my own affairs."

From these acts it is obvious that the mayor, being of opinion that his approval was essential to Erwin's appointment, was desirous that Weart should continue to act as if Erwin's title had not been perfected. He made no pretense of any power to appoint Weart to that office. On the other hand, it is equally obvious that Weart did not recognize any claim to exercise the office as corporation attorney de jure. He had, in fact, laid down the work, and he justly characterizes his action when he discloses his reluctance to "take it up." Under these circumstances, he did not acquire the position of an officer de facto by doing some work for the city. He had no new appointment to the office, and his work, which consisted in the approval of a few contracts, must be considered as the work of a mere volunteer.

As the uncontradicted evidence established the fact that Erwin rendered services to the city as corporation attorney de facto for the period named in the declaration, and that no other person was acting in that office, it only remains to determine whether Erwin can recover from the city the compensation attached to the office for that period.

The right of a de facto public officer who has accepted the position and performed its duties to the emoluments of the office has been carefully considered in our courts, and conclusions have been reached which, although somewhat at ¹⁴⁹ variance with those of the courts of other states, I deem to be in the highest degree reasonable. In *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, this court had the matter under consideration. That was an action by a de jure officer, who had, by quo warranto, ousted from his office an intruder, who had, during his intrusion, performed the official duties and received the salary attached to the office, to recover from the de facto officer the salary thus received. The prevailing opinion of Mr. Justice Van Syckel contains an accurate review of the cases on the subject, and convincingly shows that no authority precluded the adoption of rules respecting it consonant with reason and public policy. It was declared that, in this country, public office was not property, and public officers had no proprietary interest in their offices, and it was deduced therefrom that the right to the emoluments of the office arose, not out of the title to the office, but out of the actual rendition of services for which

such emoluments were designed to be compensatory. It was carefully pointed out that, upon grounds of public policy, a limitation to the doctrine stated must be applied so that one who obtained office dishonestly and fraudulently could not demand the emoluments of the office. The result was, that a majority of the court held that the intruder into office, who had become such under a certificate of election regular on its face and without fraud on his part, could retain the salary he had received while he performed the duties of the office, as against him who had, during the performance of such services, the *de jure* title to the office.

The supreme court afterward decided that one who had intruded into public office by force and fraud could not recover from the public the salary attached to the office, although he had performed the duties devolving upon the officer: *Meehan v. Freeholders etc.*, 46 N. J. L. 276; 50 Am. Rep. 421. This result I deem to be in entire accord with the doctrine of *Stuhr v. Curran*, 44 N. J. L. 181; 43 Am. Rep. 353.

That doctrine, applied to the case before us, requires us to hold that one who becomes a public officer *de facto* without ¹⁵⁰ dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services, as is fixed by law, from the municipality which is by law to pay such compensation.

In the case before us there is no pretense that Erwin dishonestly or fraudulently intruded into the office of corporation attorney. He took possession of the office, when surrendered to him by the previous incumbent. He performed its duties. It follows that he is entitled to the compensation.

For these reasons the direction to the jury to find a verdict for the city was erroneous.

This result renders it unnecessary to determine whether or not the appointment of Erwin by a board, one of the members of which was only a member *de facto*, and afterward adjudged to be a usurper, constituted Erwin corporation attorney *de jure*, and no opinion is intended to be expressed on that point.

The judgment below must, therefore, be reversed.

OFFICERS DE FACTO—WHO ARE—VALIDITY OF ACTS.—If an office exists *de jure*, a person appointed to fill a vacancy therein, who qualifies, is a *de facto* officer, although the assumed appointing power has no power to appoint: *In re Radl*, 86 Wis. 645; 39 Am. St. Rep. 918, and note. *De facto* officers are those who are in possession of office and discharging their duty under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incum-

bent is not a mere volunteer: *State v. Oates*, 86 Wis. 634; 39 Am. St. Rep. 912, and note. Acts of officers de facto are invalid except when they concern the public or the rights of strangers who have an interest in the acts alone: *King v. Philadelphia*, 154 Pa. St. 160; 35 Am. St. Rep. 817, and note; *Magneau v. Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note.

OFFICERS DE FACTO—RIGHTS AS TO SALARY.—It is well settled that the salary of an office is an incident of title thereto, and that therefore an officer de facto has no legal right to the salary attached to the office he is filling: *State v. Carr*, 129 Ind. 44; 23 Am. St. Rep. 163; *Andrews v. Portland*, 79 Me. 484; 10 Am. St. Rep. 280, and note showing that the principal case is opposed to the weight of authority.

TRENTON PASSENGER RAILWAY CO. v. COOPER.

[60 NEW JERSEY LAW, 219.]

RAILROADS—LIABILITY FOR ESCAPE OF ELECTRICITY.—Escape of electricity from a street railway, causing injury to a horse while being driven across the railway track, is presumptive proof of negligence in the operation of the railway.

EVIDENCE—RES GESTAE.—Words spoken while an affair is in progress are admissible in evidence in a narrative of the affair.

EVIDENCE—RES GESTAE.—Words spoken by the driver in an effort to control a frightened runaway horse are admissible in evidence as part of the *res gestae* in an action to recover for injuries resulting from the runaway.

EVIDENCE.—PRIOR EXPERIENCE of a witness before an emergency in which he is called to act is competent evidence to account for his exclamation and conduct in such emergency and to relieve him from any imputation of contributory negligence.

EVIDENCE LEGAL FOR SOME PURPOSE cannot be excluded because the jury may erroneously apply it otherwise. Protection may be had in such case by requesting a precautionary instruction.

APPELLATE PRACTICE.—The admission of a leading question cannot be reviewed on appeal.

J. Buchanan, for the plaintiff in error.

G. D. W. Vroom and J. H. Backes, for the defendant in error.

²²⁰ **COLLINS, J.** These two causes were argued together, upon identical bills of exceptions and assignments of error, the original actions having been tried together in the Mercer circuit.

The actions were based upon alleged negligence in the lawful operation, by means of electricity, of a street railway in the city of Trenton. In such operation an electric current was conducted through rails laid on the street, the ends of the rails being fastened together with metallic ties by a process called in the declaration and testimony "bonding." The negligence averred was in insufficient or defective bonding, permitting the

escape of electricity. In one of the actions the result averred was injury to a valuable horse owned and being driven by the plaintiff, Cooper; and in the other, personal injury to the plaintiff, Bennett, who was Cooper's hostler and was riding with him. The horse ran away, and both men were thrown from the carriage. The plaintiffs recovered damages, and the judgments have been removed by writs of error to this court.

Error is first assigned upon refusal to nonsuit. The contention is, that as the averments of negligence were limited to the bonding of the rails, the plaintiffs were obliged to point out and establish some particular defect or insufficiency in such bonding. I do not assent to this view. It would have been sufficient to aver that electricity was, through negligence, permitted to escape from the rails; but, as it appeared in the case that such escape was only possible at the ends of the rails, it was a necessary conclusion that, if it occurred, it must have been due to insufficient or defective bonding. It must be assumed that with proper and sufficient bonds the rails would have carried a current of electricity with safety to horses stepping upon them. Otherwise the operation of the railway in a public street, by means of such a current passing through its rails, was, ipso facto, a nuisance. No legislation has authorized such an infringement on the rights of the public ²²¹ in a highway. If, therefore, electricity did escape from the rails, that fact was presumptive proof of negligence.

The case comes clearly within the bounds set by this court for the right of a plaintiff to say *res ipsa loquitur*: *Bahr v. Lombard*, 53 N. J. L. 233. Of course, proof of a latent defect, or of a break in a bond, of which the managers of the railway could not, with due diligence, have learned, might rebut the presumption of negligence, but no such proof appeared in the plaintiff's case. Assuming that there was proof tending to show that electricity did escape from the company's rails and affect the horse, it was the duty of the trial judge to require a defense. There was proof, sufficient to go to the jury, of such escape and shock. The horse, previously docile and accustomed to the city streets, was being driven across the railway track. Immediately after stepping on a rail, he stopped, shook, quivered, and then plunged forward and ran so violently as to overcome all effort to restrain him. A subsequent examination by a veterinary surgeon revealed symptoms of shock by electricity.

The motion to nonsuit was properly denied; and as no conclusive rebuttal of such presumption of negligence was established

by the defense, there was no support for the renewal of the motion at the close of the evidence. The case was one for the jury.

Error is also assigned upon exceptions to the admission of testimony. Stress is chiefly laid upon permission given to the plaintiffs to testify to certain ejaculatory words admitted in evidence by the trial judge as part of the *res gestae*. Cooper testified as follows: "My horse put his foot on the northbound track, the easterly track; he stopped, came to a standstill, and he shook and quivered and then kicked, and I said to my man [interrupted by objection, ruling, and exception]—I said, 'He has got a shock, Sam, catch hold'; and he caught hold, and I found we had no control of the horse, as we pulled all we knew how."

Bennett's narration was substantially the same, and both ²²² witnesses added their statements of what happened up to the time they were respectively thrown from the carriage.

It is not disputed that words spoken while an affair is in progress are admissible in evidence in a narrative of the affair. The claim is, that the affair in question had ended before the words were spoken; that it ended with the frightening of the horse, however caused. The contrary seems too plain to need argument. The management of the horse, the conduct of both men (one of them the servant of the other), were involved in the affair. Without proof of the call for help, how could the plaintiffs satisfactorily account for Bennett's seizing the reins? The ejaculation was part of what occurred, and explained what might otherwise have defeated a recovery by one or both plaintiffs. It did not prove that the horse had received a shock, but only that Cooper said so. As was said by Chancellor Zabriskie, in a case decided in this court, where words spoken by a by-stander in an affray were held admissible in evidence: "The proof is only proof of the fact that the words were spoken and not of the truth of anything as stated in them": *Castner v. Sliker*, 33 N. J. L. 507. The testimony was properly admitted.

Cooper was also permitted to testify that he had seen a horse similarly affected by an electric shock received under like circumstances. Exception was sealed only upon the admission of a preliminary question; but I will assume that exception as intended to cover the testimony challenged in this court.

I think that any experience of the witness before the emergency in which he was called to act was competent evidence in the cause to account for his exclamation and conduct in that emergency and to relieve him from any imputation of contrib-

utory negligence. It is claimed that it is not clear from the testimony that the experience was previous to the affair in controversy. If there was ambiguity in that regard, the defendant should have removed it by cross-examination.

It was argued in this court that the admission of evidence of the witness' experience and of his cry that the horse had ²²²³ received a shock, might have been considered by the jury as tending to prove the fact of such a shock; but a simple request for proper instructions to the jury would have afforded all needed protection to the defendant. Evidence legal for some purpose cannot be excluded because the jury may erroneously apply it otherwise. The court, on request, will always guard against such an error; or if not, a party aggrieved may then take his exception: *Williams v. Sheppard*, 13 N. J. L. 76, 78.

The only other complaint was of a question propounded to a veterinary surgeon touching the symptoms of the horse. It was contended in this court that the witness did not show expert knowledge; but there was no such objection at the trial. The objections there taken were that the question was leading and called not for facts but for an opinion. Its lawful purpose was to call for an expert opinion based on observation. The competency of such an opinion cannot be gainsaid. The question was somewhat leading, but the discretion of the judge in admitting it cannot be reviewed on error: *Chambers v. Hunt*, 22 N. J. L. 552.

The judgments should be affirmed.

NEGLIGENCE—ELECTRICITY—INJURIES BY.—A company or person using wires to convey electricity is required to use very great care to prevent injury to persons or property. Proof that there was a live wire carrying a deadly current of electricity down in the public streets raises the presumption that some one has fallen in his duty to the public: *Note to McKay v. Southern Bell Tel. Co.*, 56 Am. St. Rep. 67, 68; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786. See *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114.

EVIDENCE—RES GESTAE—WHAT ADMISSIBLE AS PART OF.—To make declarations part of the *res gestae*, they must be contemporaneous with the main fact, but need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous: *State v. Arnold*, 47 S. C. 9; 58 Am. St. Rep. 867, and note; *Wilson v. Southern Pac. Co.*, 13 Utah, 352; 57 Am. St. Rep. 766, and note.

TRIAL—ADMISSION OF EVIDENCE.—If evidence is competent for any purpose, an objection to it cannot be regarded as well taken: *Parsons v. New York Cent. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450. But testimony ruled out by the court for one purpose, but ad-

mitted for another, can only be considered by the jury for the purpose for which it was received: *Macdougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134.

APPEAL—ALLOWANCE OF LEADING QUESTIONS.—To allow leading questions is within the discretion of the trial court: *Krebs Mfg. Co. v. Brown*, 108 Ala. 508; 54 Am. St. Rep. 188; and rulings in this respect are not the subject of exceptions, unless there has been an improper exercise of such discretion: *Porath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954, and note; *Turney v. State*, 8 Smedes & M. 104; 47 Am. Dec. 74, and extended note.

ROXBURY LODGE v. HOCKING.

[60 NEW JERSEY LAW, 439.]

BENEFICIAL ASSOCIATIONS—ACTIONS TO ENFORCE BENEFITS.—To secure property rights or enforce money demands against social or beneficial organizations a member thereof may, in the first place, prosecute his claim in the civil courts unless the constitution or by-laws of the organization expressly provide otherwise.

BENEFICIAL ASSOCIATIONS—ACTION TO RECOVER BENEFITS.—A beneficial organization, by express agreement, constitutional provision, or by-law, may bind its members first to seek their remedy to enforce their rights to benefits in the tribunals of the order, before bringing an action at law, and such agreement or provision enters into and becomes an inseparable part of the contractual relation, and must be adhered to by the member.

BENEFICIAL ASSOCIATIONS.—By-laws of a beneficial organization cannot be given a retroactive effect and operation unless the retrospective intention clearly appears.

BENEFICIAL ASSOCIATIONS—BY-LAWS—CONSTRUCTION.—The rule that words in a statute ought not to have a retrospective operation unless they are so clearly strong and imperative that no other meaning can be annexed to them, must be applied in the interpretation of the by-laws of a beneficial organization in contests with its members in civil courts.

W. A. Stryker, for the plaintiff in error.

M. Pitney, for the defendant in error.

439 **VAN SYCKEL, J.** The defendant in error, who was the plaintiff below, brought this suit against Roxbury Lodge, of which he is a member, to recover "sick benefits" from April 20, 1893, to February 9, 1895.

The plaintiff's action is founded upon article 9, section 1, of the by-laws of the lodge, which reads as follows:

"Sec. 1. Every brother who has been a member of this 440 lodge for six months, who is not disqualified by article 10 of these laws, shall, in case of being rendered incapable by sickness or disability of following his usual occupation, make known his case within one week to the lodge, or to one of the visiting com-

mittee, and he shall be entitled to and shall receive out of the funds of the lodge, provided he hath attained the third degree, three dollars (\$3) per week, and all others two dollars and fifty cents (\$2.50) per week during his sickness or disability, commencing not more than one week anterior to his notice; provided, such sickness or disability does not proceed from immoral conduct on his part; and provided, also, that no benefit shall be allowed for sickness or disability for less than one week, then pro rata according to the time so sick or disabled, each week to consist of seven days."

On the fourteenth day of September, 1893, which was five months after Hocking's disability, and right to benefits commenced, the by-laws of the lodge were changed, reducing the amount of benefits to which disabled members are entitled.

Two questions are involved in the controversy: 1. Whether, before instituting this suit, Hocking was bound to appeal to the sovereign grand lodge of the order for the redress which was denied to him by Roxbury Lodge; 2. Whether Hocking is bound by the by-laws reducing his benefits. Both these questions were decided by the trial court in favor of Hocking.

Where the question is a social one, involving discipline or the conduct or standing of a member of the lodge, he must exhaust his remedy in the tribunals of the lodge before he can invoke the aid of the civil courts: *Zeliff v. Knights of Pythias*, 53 N. J. L. 536.

In that case, the court observed that there is a distinction between cases in which the association subjects its members to discipline for violation of its rules and those instances in which the member seeks to enforce money demands against the social organization. In the latter case, a contractual relation exists between the society and its members, as was recognized ⁴⁴¹ in *Holland v. Chosen Friends*, 54 N. J. L. 490, and that draws to it a legal rule not applicable to the subject of discipline.

The general rule is, that to secure property rights or enforce money demands, the member may, in the first place, prosecute his claim in the civil courts.

The exception is, where the constitution of the defendant organization contains an express agreement binding its members first to seek their rights in the tribunals of the order before bringing an action at law.

That was the posture of affairs in *Ocean Castle v. Smith*, 58 N. J. L. 545, and our supreme court distinctly ruled that these lodges may provide methods for hearing the controver-

sies of their own members, and that the members may bind themselves to have recourse thereto in the first instance and before invoking the civil courts.

The agreement to exhaust the remedy provided by the lodge enters into and becomes an inseparable part of contractual relation, and the member cannot enforce the contract on the part of his lodge without executing it on his own part.

The same view was taken by this court in affirming the case of *Smith v. Ocean Castle*, 59 N. J. L. 198.

In the principal case, the constitution of the lodge provides, with much detail, the mode of procedure before the lodge and for appeal where charges are preferred against a member, but no provision is made for the trial and enforcement of a claim to benefits.

The only reference to a prosecution in the tribunals of the lodge for a money demand is in the proviso of rule 13, which reads as follows: "That in all cases of appeals to the grand lodge of New Jersey, the fact of such an appeal shall act as a stay of proceedings; and in all cases appealed to the sovereign grand lodge the fact of such an appeal shall act as a stay of proceedings, and the decision of the subordinate shall be final until reversed by the sovereign grand lodge; provided, when an appeal refers to benefits, the amount in dispute shall ⁴⁴² be paid by the subordinate lodge to the grand secretary to await the final determination of the case."

The express provision for procedure in the lodge being restricted to matters of discipline by implication excludes the idea that money demands are to be taken cognizance of by the tribunals of the defendant order. It also necessarily limits the application of rule 13 as to appeals to cases in which the constitution and by-laws give an appeal. As in this case there is no provision made for a trial within the lodge, there can be no appeal to which rule 13 is applicable.

It is true that the proviso in rule 13 says "when an appeal refers to benefits," et cetera. The function of a proviso is to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause: *Wayman v. Southard*, 10 Wheat. 30; *Voorhees v. Bank of U. S.* 10 Pet. 449; *Lanning v. Lanning*, 17 N. J. Eq. 228; *Minis v. United States*, 15 Pet. 423; *Potter's Dwaris on Statutes*, 118; *Sedgwick's Statutory Constitutional Law*, 49; *Endlich on Interpretation of Statutes*, secs. 184, 186.

Article 9, section 1, of the by-laws imposes an absolute lia-

bility to pay sick benefits in cases within its terms, without in that or in any other provision requiring the member to submit his claim to the adjudication of anybody within the lodge. No prior adjudication by the lodge being provided for, the proviso in rule 13 cannot impose upon the member the duty to take an appeal.

The trial court, in maintaining the right of the member to prosecute this suit, committed no error. The constitution of the lodge, article 5, section 6, provides that a sick member shall be entitled to such weekly benefits as shall be fixed by the by-laws. The by-laws adopted by the lodge and in force at the time Hocking became sick, provided the weekly allowance he recovered in this suit. Whether the lodge had power to reduce the allowance to the plaintiff below by changing the by-laws after he became sick need not be decided in this case.

⁴⁴³ The by-laws of September 14, 1893, relied upon by the lodge, does not on its face purport to apply to any member whose sickness or disability antedates its passage. The language is: "That every brother who has been a member for six months shall, in case of being rendered incapable by sickness or disability, be entitled to receive the reduced allowance therein specified." This refers to future disability—to members who become disabled after its passage. This construction is in accordance with the rule adopted in many adjudged cases: *Cohen v. Supreme Sitting*, 105 Mich. 283; *Wheeler v. Supreme Sitting*, 110 Mich. 437.

In this state the leaning of the courts has always been against giving to statutes any retroactive effect, and, as a general rule, unless the retrospective intention clearly appears, a statute will be construed to be prospective only: *Belvidere v. Warren R. R. Co.*, 34 N. J. L. 193; *Baldwin v. Newark*, 38 N. J. L. 158; *Elizabeth v. Hill*, 39 N. J. L. 555; *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311.

In the case last cited this court declared that "words in a statute ought not to have a retrospective operation, unless they are so clearly strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."

No reason appears why this by-law, which declares what shall be the law as between these parties, shall not be subject to the rule of interpretation which pertains to the construction of statutes.

In my opinion, there was no error of law in the trial court, and the judgment below should, therefore, be affirmed.

INSURANCE—MUTUAL BENEFIT SOCIETIES—BY-LAWS—RESORT TO COURTS.—There exists some difference of opinion as to the validity of by-laws of mutual benefit associations whose object is to entirely deprive its members of their right to resort to the courts to enforce rights against the association; but the member is generally required before bringing suit to first exhaust his remedies prescribed in the constitution, charter, and by-laws of the association in which he is insured: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 546, 547. Compare *Baltimore etc. R. R. Co. v. Stankard*, 56 Ohio St. 224; 60 Am. St. Rep. 745, and note.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—CONSTRUCTION.—While a mutual benefit society has the power to make, alter, abrogate, or amend its by-laws, it cannot so exercise this right that it will operate as a repudiation of its obligations, or to work a forfeiture of rights previously vested in its members. A new law of a mutual benefit society will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556, 557; monographic note to *Austin v. Searing*, 69 Am. Dec. 674.

WANSER *v.* HOOS.

[60 NEW JERSEY LAW, 482.]

STATUTES—GENERAL AND SPECIAL LAWS.—A general law, as distinguished from a special or local law, is a law that embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. The test of the generality of a law is that it shall embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class.

STATUTES—GENERAL AND LOCAL LAWS—CLASSIFICATION.—Although population may be made the basis of classification in statutes relating to municipal bodies, such classification cannot be made the means of evading the constitutional interdict against local or special laws. The question whether any particular statute is local or special must be determined not upon its compliance with legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law.

STATUTES—MUNICIPAL GOVERNMENT.—Classification on the basis of population in statute relating to the machinery and powers of municipalities is legitimate, if such population bears a reasonable relation to the necessities of such municipalities. Classification is in such cases necessarily committed to the judgment of the legislature, and such judgment must prevail, unless the classification is plainly illusory or applied illusively.

STATUTES—LOCAL LAWS.—If a law is in terms local, satisfactory reasons must be found to exclude it from constitutional objections. That municipalities to which it applies have been properly classified for general municipal purposes does not of itself furnish a sufficient reason for sustaining such legislation.

STATUTES—GENERAL AND LOCAL LAWS.—The principle by which general laws are distinguished from either special or local laws applies to all legislation regulating the internal affairs of municipalities, and the discretion that enters into the decision of the question whether a particular law is general or local or special is that where the classification appears to rest on substantial grounds, and the line of demarcation which separates the places included from those excluded is a matter of judgment, the judgment of the legislature must prevail, unless it plainly appears that such classification is an evasion of constitutional requirements.

STATUTES—GENERAL AND LOCAL LAWS.—In every case the primary question in the process of determining whether a particular law, local or special on its face, is a general law in the sense of the constitution, is the consideration whether the classification adopted is based on those substantial grounds which justify the limitations of its enactment to one set of municipalities to the exclusion of others. No question of legislative discretion can possibly arise until this preliminary question is solved.

STATUTES — LOCAL LAW — CONSTRUCTION.—A statute providing that all municipal officers in cities of the first class shall be elected at the annual election of state and county officers, and upon the same official ballots as the latter, relates neither to the machinery, structure, or powers of municipal government, and, as no substantial grounds appear therefrom for a discrimination between cities of the first class and cities of other classes in respect to such legislation, such law is local and special within the meaning of the constitution prohibiting such legislation. Population is not a legitimate basis of classification for the purpose of such legislation.

Corbin & Corbin and J. A. Blair, for the plaintiff in error.

A. L. McDermott and W. D. Daly, for the defendant in error.

524 **DEPUE, J.** The issue presented in this case is upon the validity of an act of the legislature, passed March 18, 1897, entitled, "An act relating to cities of the first class in this state, and providing for the holding of municipal and charter elections therein, and regulating the terms of elective and appointive officers therein": Pamph. Laws, p. 43. It provides that all municipal officers in cities of the first class shall be elected in each year on the first Tuesday after the first Monday of November, which is the day fixed for the annual election of state and county officers, and upon the same official ballots required by law for the election of state and county officers. It combined the election of municipal officers with elections for state and county officers, which theretofore had been kept separate. The contention was, that this act was in violation of constitutional provisions. This contention was sustained by the supreme court.

Paragraph 11, section 7, of article 4 of the constitution provides that the legislature shall not pass any private, local, or

special laws in certain enumerated cases, among which is "regulating the internal affairs of towns and counties." This constitutional prescription is a restriction on the sovereign power of the legislature that did not appear in either the constitution of 1776 or 1845. It was introduced into the organic law of this state by an amendment in 1875, and grew out of the public appreciation of the evils that sprang from local and special legislation in relation to municipal affairs. The people, in adopting this constitutional provision, intended to eradicate the source of these evils. In language too plain and explicit to be misapprehended, it prohibited the legislature from passing any local or special law on those subjects, and restricted such legislation to general laws.

The construction and force of this constitutional provision present a legal question to be decided by the courts: *State v. Rogers*, 56 N. J. L. 480. The course of legislation on this subject by the legislature, while it is entitled to respect, cannot be permitted to control the decision of the judicial ⁵²⁵ department of the government in its construction of the constitutional provision, for, as was said by Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 389, "the power to make or unmake (the fundamental instrument of government) resides only in the whole body of the people and not in any subdivision of them."

The legislature may, without infringing on this constitutional interdict, resort to classification for the convenience of legislation. The act of 1882 (Gen. Stats., p. 458), by which cities were divided into classes on the basis of population, and other statutes by which boroughs and counties were in like manner divided, are instances of such legislation. The act of 1882 expressly declares that the classification therein made was for the purpose of municipal legislation in relation to cities, and that all legislation founded upon such classification should be construed to embrace all cities of the class referred to.

The courts, in a series of cases too numerous to be cited, have given to this constitutional provision a fixed construction. In the first case in which this provision came before the court, a general law, as contradistinguished from a special or local law within the meaning of the constitution, was defined to be a law that embraced a class of subjects or places and did not omit any subject or place naturally belonging to such a class: *Van Riper v. Parsons*, 40 N. J. L. 1.

The test of the generality of a law adopted is, that it shall

embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. It is also equally well settled by decisions of our courts that, although population may be made the basis of classification in statutes relating to municipal bodies, such a classification cannot be made the means of evading the constitutional interdict of local or special laws. The question whether any particular statute is local or special must be determined, not upon its compliance with a legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law as defined by the courts.

⁵²⁶ The supreme court of the United States has likewise proceeded upon this principle in deciding upon the validity of statutes under the equality clause in the fourteenth amendment to the federal constitution. In *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, the court held that there might be classification for the purposes of legislation, but that the mere fact of classification was not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection; and in the application of that principle the court set aside an act of state legislation as in violation of the constitutional provision.

It must not, therefore, be inferred from the language used in the opinions of the courts that the mere aggregation of individuals in a municipality is the actual basis on which a classification may legitimately rest. The constitutional prescription relates to the regulation of the internal affairs of towns and counties without regard to population, and it applies as well to the lesser as to the greater municipalities in this state. In *In re Haynes*, 54 N. J. L. 25, 28, Chief Justice Beasley, in discussing this subject, speaking of an act establishing a board of street and water commissioners in cities of the first class, observed: "It is true that the classification of our cities is made on the basis of population, but this term, in this connection, connotes not only the number of the inhabitants, but also municipal magnitude in all respects; and a city largely populous must necessarily have a great stretch of streets and a water supply of immense volume. It is the largeness of

such necessities, incident to a great population, that differentiates cities of the first class from cities of the other classes, and the consequences is, that all legislation regulative of such necessities, on account of their magnitude, is obviously constitutional, as it is germane to the basis of municipal classification." ⁵²⁷ If, therefore, municipal population, when it is large, does not require a different kind of machinery from that which is suitable to a small population, then it would be plain that the position of the counsel of the relators (that the act was special and local) would be impregnable. The chief justice reiterates the same views in *Matheson v. Caminade*, 55 N. J. L. 4.

In *Warner v. Hoagland*, 51 N. J. L. 62, a statute relating to streets, avenues, parks, and sewers, in which cities of the first class were excepted, was sustained on the ground that the extent and cost of local improvements necessary to the growth and prosperity of the excepted cities require efficient and expensive city governments, and that the affairs of these municipalities could not be managed by local governments adapted to cities of the population and insulated position of the smaller cities of the state. The same reasoning was adopted by the court in *Randolph v. Wood*, 49 N. J. L. 85, and also in *Mortland v. Christian*, 52 N. J. L. 521, 538. The counsel of the plaintiff in error having relied considerably upon the latter case to sustain the present legislation, a statement of the grounds upon which that case was decided will be appropriate. The act then under consideration was one changing the membership and mode of election of the boards of freeholders in counties of the first class. In sustaining the law as not being local and special, the learned judge who delivered the opinion of this court said: "No one familiar with the construction and operation of boards of freeholders in the several counties in this state can fail to see that, by this scheme, an entirely new and distinct system of administrative machinery is provided—one more compact in form, with greater executive possibilities, making greater demands upon the time and services of the members, for which increased pay is provided, together with an increase of individual responsibility, with which is coupled a substantial security to the public by means of bonds with heavy penalties. That such a system is not applicable to the smaller counties is not less evident than that the existence of such machinery would ⁵²⁸ be an unnecessary and disastrous burden upon their finances. Whether the largest counties do require

boards of such increased efficiency is not for us to decide. If they do, it is evidently in respect to matters growing out of excess of population. The legislature, in whom the determination of these questions is vested by the constitution, has decided that counties of the first class do require a change of the character indicated by this act, which changes, from the considerations just mentioned, are inappropriate to the smaller counties for the same reasons which constitute their appropriateness to the larger ones. Such being the relation borne by the provisions of this act to the various counties of this state, viewed from the standpoint of population, the act in question must be deemed to be general, in that it reaches the one class to which the legislature has determined that it is appropriate, and that that class is distinguished by those features which constitute its appropriateness from all the other counties in the state." The act sustained was restricted to counties of the first class. It created boards of freeholders in such counties, with membership, powers, duties, and responsibilities different from those pertaining to boards of freeholders in other counties of the state, and changed the time of the election of its members from the spring to the annual election in the fall. The act concerned the machinery by which the affairs of these counties were administered, and the classification was sustained by this court on the ground of the magnitude of the interest which came under the jurisdiction of boards of freeholders in those counties, which made the system of administrative machinery adopted appropriate to such larger counties and inappropriate to the smaller counties in the state. The change in the time for holding the election of these officers, who were county officers, to the election day on which the other county officers were elected, was a mere incident in the scheme of administration provided by the act, which, the classification having been found to be lawful, was, in the judgment of the legislature, necessary, and in fact was eminently appropriate, for the election of the members of ⁵²⁰ the newly created boards, who were elected from the assembly districts, and was a matter of discretion on the part of the legislature. This case gives no countenance to the notion that the legislature may classify on the basis of population, and thereupon legislate upon any subject relating to the internal affairs of municipalities untrammelled by the constitutional prescription. The decision gives no support to the act under consideration.

State v. Borough, 53 N. J. L. 277, is not in conflict with the

cases above referred to. The act sustained provided a scheme for organizing borough governments. It provided for the incorporation of the inhabitants of any township or part of a township embracing an area not exceeding four square miles and containing a population not exceeding five thousand, whenever, at an election called and conducted in a specified manner, a majority of the electors therein qualified to vote for state and township officers approved of it. In providing for these local governments, population, whatever it may represent or indicate, as well as area, are considerations necessarily entering into the propriety of establishing such local governments, and, as was said by the present chief justice, "population does bear a plain and obvious relation to the necessity and propriety of various grades of municipal government." The classification on the basis of population as well as area being necessarily committed to the judgment and discretion of the legislature, the court declared that it would not interfere with the legislative judgment unless the classification be illusive or be applied illusively. The provisions of the act were extended throughout the state and open to be accepted by a popular vote wherever area and population complied with the requirements of the act.

Paul v. Gloucester County, 50 N. J. L. 586, is a case of similar aspect. An act to regulate the sale of intoxicating and brewed liquors was under examination. The question pertinent to this discussion was whether the classification by population for the purpose of fixing the minimum license fee was vicious. ⁵³⁰ In that case the legislation in question was under the police power of the state. The evil at which the legislation was aimed was one that concerned individuals, and the regulation of this traffic had prevailed in this state from the earliest period. In the opinion of this court sustaining the law, Mr. Justice Van Syckel said (at page 592): "In administering the license laws the practice has prevailed, under the inn and tavern act, to regard the density of population in fixing the license fees. Where the population is dense the legislature may have concluded that the people will be more prosperous; that they will expend their money for luxuries more freely and will pay higher prices than in sparsely settled districts. Also, that the larger the population the greater will be the expense of maintaining the police department. No more suitable basis of classification which the legislature could have selected for itself has suggested itself during my consideration of this subject." Indeed, it may be said with great force that

no classification for the purpose of regulating the sale of intoxicating liquors is so eminently appropriate as a classification on the basis of population. *Matheson v. Caminade*, 55 N. J. L. 4, is also a similar case. The legislation under examination established in every city of the second class having a population of fifty thousand or over one police court, and provided for the appointment of the judge by the governor, with the advice and consent of the senate. The contention was, that cities of this class were not possessed of any quality that would justify the giving to them alone a court of this character. The chief justice, in his opinion, declares that this criticism had no force, unless it be assumed that the needs of the smaller cities regarding magistracy were identical with the larger ones. He said: "Such an assumption would, of course, be absurd, and yet, if it be admitted that places of great population require and are entitled to a more elaborate system of police than places of a sparse population, the fallacy of the position in question is demonstrated, for the legality of a legislative classification for such municipalities has become manifest."

531 It would need no argument to demonstrate that it is density of population that in a great measure creates the necessity for increased police service. Population in that respect is an appropriate, if not the most appropriate, classification for such legislation. It was with respect to legislation of the character of that involved in *State v. Borough*, 53 N. J. L. 277, and *Matheson v. Caminade*, 50 N. J. L. 4, that Mr. Justice Van Syckel, in *Paul v. Gloucester City*, 50 N. J. L. 592, said: "Whether the basis of classification is wise or judicious, or whether it will operate as fairly as some other basis that might be adopted, is a question for the legislature and not for the courts. The extreme limit of our inquiry in this direction is, Does population bear any reasonable relation to the subject to which the legislature has applied it? Is it germane to the law?"

The act now in hand is not an act establishing a scheme of local government, as was the act in the *Clayton* case. It is an act regulating the internal affairs of existing municipalities. Nor is it a police regulation in which population is essentially the basis of classification, as in *Paul v. Gloucester City*, 50 N. J. L. 586, and *Matheson v. Caminade*, 55 N. J. L. 4. This act stands on considerations extraneous to those in the class of cases above cited. A case more pertinent to the case in hand is *Anderson v. Trenton*, 42 N. J. L. 486, 488. In that case a classification on the basis of population in an act authorizing

cities having a population of not less than 25,000 to issue municipal bonds was held to be an illusory classification, and the court set aside the act on the ground that it could not see any natural connection between the number of people in a city government and its right to fund a floating debt. The learned judge who delivered the opinion of the court said that it was manifest that "if the classification made by a statute is to be justified or not by considering whether it is proper to apply the peculiar provisions of the law to the particular individual or individuals designed to be affected, then laws will be upheld or overthrown, not as the courts shall decide them to be general or special, but as they shall deem them wise or unwise. No rule heretofore laid down in this state sanctioned such a ⁵³² test of constitutionality, nor do I think that such a criterion should be adopted."

It is also apparent from the decisions in the courts of our own state and in other jurisdictions, federal and state, that when a law is in terms local, satisfactory reasons must be found to exclude it from the constitutional interdict. That the cities or municipalities to which it applies have been properly classified for general municipal purposes does not of itself furnish a sufficient reason for sustaining such legislation. Otherwise the elaborate reasoning in *Ex parte Haynes*, 54 N. J. L. 25, *Mortland v. Christian*, 52 N. J. L. 521, and similar cases was superfluous. The court should have simply said, "these cities have been legally classified and the legislature may deal with their internal affairs in its discretion."

The principle by which general laws are distinguished from those which are either local or special applies to all legislation regulating the internal affairs of municipalities, and the discretion that enters into the decision of the question whether a particular law is general or local or special is that where the classification appears to rest on substantial grounds and the line of demarcation which separates the places included from those excluded is a matter of judgment, the resolution of the legislature will prevail, unless it plainly appears that such classification is an evasion of the constitution.

In the much canvassed case of *Mortland v. Christian*, 52 N. J. L. 538, 539, similar views were expressed by Mr. Justice Garrison, who said: "Whether the largest counties do require boards of such increased efficiency is not for us to decide. If they do, it is evidently in respect to matters growing out of excess of population. The legislature, in whom the determination of

these questions is vested by the constitution, has decided that counties of the first class do require a change of the character indicated by this act, which changes, from the considerations just mentioned, are inappropriate to the smaller counties for the same reasons which constitute their appropriateness to the larger ones. . . . The act in question must be deemed to be general in that it reaches the one class to which the ⁵³³ legislature has determined that it is appropriate, and that that class is distinguished by those features which constitute its appropriateness from all the other counties in the state."

In *State v. Borough*, 53 N. J. L. 278, 279, the present chief justice said: "In determining whether this act is general, within this meaning [that is, whether the class is composed of all municipalities which, considering the purposes of the legislation are distinguished from others by qualities or characteristics such as to make the legislation appropriate to them and inappropriate to others], its purpose is first to be considered, and it is then to be determined whether the municipalities on which it operates have substantial distinctions segregating them from other municipalities, and evincing that such legislation is germane to them and not to others." In every case the primary consideration in the process of determining whether a particular law, local or special on its face, is a general law in the sense of the constitution is the consideration whether the classification adopted is based on those substantial grounds which justify the limitation of its enactments to one set of municipal bodies and the exclusion of others. No question of legislative discretion can possibly arise until the preliminary question is solved.

It was conceded that the legislation in question is a regulation of the internal affairs of the cities to which it applies, but it was contended that it related to the structure and machinery of government, and, therefore, classification on the basis of population was legitimate, whether the structure and machinery provided were equally appropriate to other cities or not. It must not be assumed that acts relating to the structure or machinery of municipal government are freed from those rules apt to distinguish general from local and special laws in other cases. The decisions are directly to the contrary. But it is unnecessary to discuss the conditions under which discretion may be said to enter into legislation affecting the structure of municipal government, as exemplified in *Matheson v. Caminade*, 55 N. J. L. 4, and *McLaughlin v. Newark*, 57 N. J. L.

298, for the cases cited do not sustain the assertion that this act ⁵³⁴ relates to either the structure or the machinery of government. In *State v. Borough*, 53 N. J. L. 277, the act provided for the organization of local governments with the appropriate machinery. In *McLaughlin v. Newark*, 57 N. J. L. 298, the act provided the means of dividing cities of the class embraced in it into wards and election districts. It dealt, as was said by the learned justice who delivered the opinion of the court, only with the structure of the government—the formation of the machinery by which the affairs of the city are to be regulated. In *Ex parte Haynes*, 54 N. J. L. 25, the act constituted municipal boards in certain cities and defined their powers and duties. The act, as was said by the chief justice, dealt exclusively with the machinery by which the city interests within their departments were to be regulated. In *Owens v. Furey*, 55 N. J. L. 1, the act established a municipal board of public works in certain cities. In *Matheson v. Caminade*, 54 N. J. L. 4, the act established a police court in cities of the second class and provided for the manner of the appointment of the magistrates by which such courts should be held. In these and all the cases in which statutes based on a classification on the ratio of population were sustained, for the reason that they related to the structure or machinery of municipal government, such legislative acts were directed immediately to the structure of the municipality itself or to the powers or the machinery of municipal government.

The act under examination differs in every material respect from those involved in the preceding cases. It in no sense affects the machinery, powers, or structure of the city governments, nor does it change the mode of selecting city officers. The constituency by which those officers are elected remains the same. The act simply changes the date of their election by the same constituency and combines the election of municipal officers with the election of state and county officers upon the same official ballot. It applies only to cities of the first class—that is, to those having a population exceeding 100,000. Newark and Jersey City are the only cities of this state with a population above the limit mentioned ⁵³⁵ in the act, the population of Newark being, by the census of 1895, 215,806, and Jersey City, 182,713. Among the cities with a population not exceeding 100,000 are Paterson, with a population of 97,344; Camden, with a population of 63,467; Trenton, 62,518; Hoboken, 54,083, and Elizabeth, 43,834.

From the earliest period in the history of this state it has been the policy to keep the election of township, town, and city officers separate from the election of state and county officers. This policy is forcibly expressed in an act of the legislature passed in 1889 (Gen. Stats., p. 1331), which in its preamble recited, "Whereas, it is deemed for the best interest of municipal government that elections for local officers should not be held on general election days," and enacted "that no local or charter election shall be held in this state on the same day fixed for the holding of a general election or on the day when members of the general assembly are now elected by law." At the time this act was passed no one of the cities, towns, boroughs, or townships had its local election coincident with the state and county elections. The act changes the day for municipal elections in the two cities and combines the election for local officers with the election for state and county officers. The issue presented by this record is whether, having regard to the subject matter of this legislation, cities having a population exceeding 100,000 have, by reason of population, characteristics distinguishing them from cities with a population of less than 100,000, which would make such legislation appropriate to the former class of cities and inappropriate to cities having a less population. In solving this issue, it must be borne in mind that this act, as already observed, in no sense relates either to the machinery or the powers or the structure of city government. On what ⁵³⁶ course of reasoning can substantial grounds be found for discriminating between the cities of the one class and other cities, towns, townships, and localities in the matter of holding local elections at the same time and combined with elections for state and county officers? What characteristics are inherent in the population or affairs of the two cities embraced in the act distinguishing them from other cities—Hoboken, Paterson, Elizabeth, Trenton, and Camden, cities of large population—which render an election for local officers, combined with an election for county and state officers, appropriate to the one class and inappropriate to the other, of such magnitude and importance as will justify the inclusion of the one class and the exclusion of the other from this scheme of legislation? The act being local on its face, just grounds for such discrimination must be found in its subject matter to relieve it from the constitutional interdict.

In the supreme court the grounds assigned for such a discrimination appear, briefly, to have been the double expense,

the lack of interest on the part of voters and consequent negligence in the choice of candidates, and in safeguards against election frauds, such as bribery, fraud, and corruption. Under the latter head it was argued that offices in large cities being more lucrative the temptation to election frauds is greater, calling for more elaborate and expensive safeguards than are applicable to charter and municipal elections elsewhere. It will be observed that by the act of February 19, 1896 (Pamph. Laws, p. 13), it is provided that in every city of this state having a population exceeding 40,000, the charter election and all elections for municipal officers should be held and conducted as the elections for members of the general assembly were held and conducted at the last election preceding the time of holding such charter election or election for municipal officers. If the stringent election laws which apply to the fall elections are necessary to suppress frauds in the conduct of elections, such laws are in force in Paterson, Camden, Trenton, Hoboken, and Elizabeth, cities having a population in excess of 40,000, and these cities are excluded ⁵³⁷ from the legislation under review. And as covering the whole of this subject, if any advantages are to be gained or evils prevented by combining elections for city officers with state elections, can any reasonable ground be assigned for conferring such benefits upon Jersey City which should not be conferred upon Hoboken in the same county, or granted to Newark and denied to Paterson, Camden, Trenton, Elizabeth, and, I may add, other cities in the state?

With respect to the other reasons assigned as grounds for the discrimination created by this act, such as the expense of separate elections, lack of interest in voters and election frauds, these evils exist in a comparative degree in all the cities of this state, and if the combination of municipal and state elections will cure these evils, other cities cannot lawfully be excluded from this curative process. The reasoning of the justices of the supreme court on these subjects is so satisfactory that elaboration is unnecessary. Indeed, I may say that the counsel who argued this case in this court for the plaintiff in error, by his brief, seems to have repudiated the existence of any grounds to justify this classification by that process of reasoning. His argument for reversing the judgment below rests mainly, if not wholly, upon the contention that this legislation relates to the structure and machinery of local government—an argument which, to me, seems unfounded.

Being of opinion that this act is an act regulating the in-

ternal affairs of cities based upon an insufficient classification, and therefore in violation of the constitutional prescription, I shall vote to affirm the decision of the supreme court.

MR. JUSTICE DIXON dissented, and maintained that the statute under consideration was valid and constitutional. He based his conclusion upon the following propositions: "1. Our earliest cases involving the effect of the constitutional amendment forbidding the passage of private, local, and special laws to regulate the internal affairs of towns and counties, lay down the principle that a law is general, and so not prohibited, if it applies to a class of towns, provided the class is formed upon a basis which bears some reasonable relation to the subject of the law: *Van Ripper v. Parsons*, 40 N. J. L. 1; *Hammer v. Richards*, 44 N. J. L. 667. 2. Later cases decide that towns may constitutionally be classified upon the basis of their population, for the purpose of legislation, whenever there exists a reasonable relation between population and the object of the law: *Randolph v. Wood*, 49 N. J. L. 85; on error, 50 N. J. L. 175. 3. Contemporaneously with the announcement of the foregoing rule, it was declared that whenever population may constitutionally be made the basis of classification, the line of demarcation can be drawn in the discretion of the legislature, provided it be not drawn illusively—that is, 'with a view of escaping the constitutional restriction,' as Chief Justice Beasley expressed it in *Van Riper v. Parsons*, 40 N. J. L. 9; *Randolph v. Wood*, 49 N. J. L. 91; *Paul v. Gloucester County*, 50 N. J. L. 585, 592; *Warner v. Hoagland*, 51 N. J. L. 62, 68; *Mortland v. Christian*, 52 N. J. L. 521, 538; *Mathison v. Caminade*, 55 N. J. L. 4. Manifestly the rule last mentioned is but a corollary from the previous decisions, for, place the line of cleavage where you will, and let the reason for discriminating between the smallest member of the lower class and the largest member of the higher class be ever so strong, that reason will approach the vanishing point when you compare the largest member of the lower class with the smallest member of the higher class; consequently, the line between these must be drawn arbitrarily or nearly so, and this arbitrary power must rest with the legislature, subject to the proviso stated. 4. Our most recent decisions have, in some cases, expressly declared, and in others assumed, that there exists a reasonable relation between the population of towns and their 'structural forms of government and administration—the structure of the municipal government, the formation of the machinery by which their local affairs are to be regulated.' This proposition is sustained by the uniform practice of civilized nations, for everywhere the systems of municipal government provided for large communities differ from those adopted for small ones. Our courts have relied upon it to support many statutes dealing with a great variety of municipal concerns: *Mortland v. Christian*, 52 N. J. L. 521; *In re Haynes*, 54 N. J. L. 6, 28; *Lewis v. Moore*, 54 N. J. L. 121; *In re Sewer Assessment for Passaic*, 54 N. J. L. 156; *Owens v. Fury*, 55 N. J. L. 1; *Mathison v. Caminade*, 55 N. J. L. 4; *Baker v. Delaney*, 55 N. J. L.

9; *Oler v. Ridgeway*, 55 N. J. L. 10; *McLean v. Gibson*, 55 N. J. L. 11; *Calvo v. Westcott*, 55 N. J. L. 78; *McLaughlin v. Newark*, 57 N. J. L. 298; on error, 58 N. J. L. 202; *Johnson v. Asbury Park*, 58 N. J. L. 604. The propositions thus established embody this rule applicable to the present case: That a law will be general, although it embraces only a class of cities formed on the basis of their population according to the discretion of the legislature, provided the law deals merely with the structure or machinery of municipal government, and provided the class does not appear to have been formed illusively. I consider this statute as one dealing with a class of cities formed by the legislature in the exercise of its constitutional discretion upon a basis reasonably related to the object of the law."

Mr. Justice Collins also dissented and based his conclusions upon the following rules: "1. For legislation dealing only with the structure of municipal government—the formation of the machinery by which municipal affairs are to be regulated—the municipalities of the state may be distributed into classes constituted on the basis of population."

In support of this rule were cited *McLaughlin v. Newark*, 57 N. J. L. 298, 299; 58 N. J. L. 202; *Warner v. Hoagland*, 51 N. J. L. 62; *In re Haynes*, 54 N. J. L. 6; *Owens v. Fury*, 55 N. J. L. 1. In *Mortland v. Christian*, 52 N. J. L. 521, this court adjudged that local elections are subject to legislative change on the basis of population, and did so on the express ground that the act then under review concerned the machinery of administration: *Mortland v. Christian*, 52 N. J. L. 537; *State v. Clayton*, 53 N. J. L. 277-281; *Matheson v. Caminade*, 55 N. J. L. 4-6. "2. When the drawing of some line of demarcation between the larger and the smaller aggregations of people is justified, it is for the legislature to say where that line shall be placed": Citing *Randolph v. Wood*, 49 N. J. L. 85-91; 50 N. J. L. 175. "3. Legislation appropriate to a proper class of municipalities is valid, though not extended to other classes to which it may be equally appropriate. This rule results from the reasoning and decisions in several cases, among them *State v. Borough*, 53 N. J. L. 277, followed and approved by this court in *Road Commission v. Harrington Tp.*, 55 N. J. L. 327." Also citing in support of this rule and the constitutionality of the statute under review, *Johnson v. Asbury Park*, 58 N. J. L. 604-607; *Mortland v. Christian*, 52 N. J. L. 521.

STATUTES—SPECIAL, LOCAL, AND GENERAL—TESTS.—General laws are those which operate alike on all persons to whom they apply, and apply equally to all persons in the same category within the jurisdiction of the law-making powers: Note to *State v. Sheriff*, 31 Am. St. Rep. 653. Whether statutes are laws of a general nature or not depends upon their subject matter, and not their form: *State v. Ellet*, 47 Ohio St. 90; 21 Am. St. Rep. 772. The local character of a statute does not make it necessarily unconstitutional. The legislature must determine whether particular rules shall extend to the whole state and its citizens, or, on the other hand, to a subdivision of the state or a single class of citizens: *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659,

and note. See *State v. Bargus*, 53 Ohio St. 94; 53 Am. St. Rep. 628, and note; monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789, discussing the subject of general and special laws.

STATUTES—SPECIAL AND GENERAL, RELATIVE TO MUNICIPAL CORPORATIONS.—The distinction between special and general laws is often closely drawn in construing statutes relative to municipal corporations. It is held that the legislature may enact general laws, which, from their nature will be capable of enforcement in particular portions of the state only; or it may, by other general laws, authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization in certain portions of the state only: *In re Madera Irrigation Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106; that a statute relating to cities of more than five hundred thousand is not a local or private law: *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893, and note; that the fact that an act is applicable to the conditions existing in a single city in the state will not necessarily render it local or special legislation: Note to *State v. Sheriff*, 31 Am. St. Rep. 653. Contra, *State v. Des Moines*, 96 Iowa, 521; 59 Am. St. Rep. 381. But when a statute attempts to classify cities the classification must be based upon some substantial reason, and cannot be merely illusory, if it would be sustained as general legislation: See monographic note to *State v. Ellet*, 21 Am. St. Rep. 784, 785. See *Pell v. Newark*, 40 N. J. L. 550; 29 Am. Rep. 266.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BUCK'S ESTATE.

[185 PENNSYLVANIA STATE, 57.]

A LICENSE TO SELL LIQUOR is a personal privilege, and therefore is not assignable by the holder and is not an asset of his estate, and does not go to his personal representatives.

EXECUTORS AND ADMINISTRATORS—WHEN CHARGEABLE WITH THE VALUE OF THE GOODWILL OF A BUSINESS ENHANCED BY A LICENSE.—One who procures letters of administration on the estate of a decedent who was conducting a saloon business under a lease and a license, neither of which had expired, is liable, if he takes possession of the premises and continues the business, for the value of the goodwill thereof, which may be enhanced by the fact of such license, though the license itself cannot be transferred to another.

Exceptions to the account of the administrator of the estate of S. B. Buck, deceased. He, in his lifetime, was a saloonkeeper holding a lease of the property in which he did business and a license to sell liquor, which had several months to run. The administrator took possession of the premises and carried on the business, procuring a transfer of the license to himself without accounting, except for the appraised value, to wit, two hundred dollars. The evidence showed that the unexpired term, with the goodwill of the business and the opportunity of obtaining a continuance of the license, were worth from two thousand to two thousand five hundred dollars, and that the administrator had received an offer of four thousand dollars therefor. The trial judge charged him with two thousand five hundred dollars and interest, and he appealed.

Samuel Peltz, for the appellant.

Thomas Leaming, for the appellee.

⁵⁹ FELL, J. The finding of the learned auditing judge that the unexpired term of the lease of the saloon and the goodwill of the business, with the opportunity of procuring a transfer of the license, were worth from two thousand dollars to two thousand five hundred dollars, and that the accountant, without making an effort to procure a purchaser, appropriated them to himself, fully sustains the surcharge made. In Grimm's ⁶⁰ Estate, 181 Pa. St. 233, relied on by the appellant, the executor sold the stock and fixtures to the widow of the decedent and she secured a new lease, and on her petition the license was transferred to her. There was no evidence of collusion, nor any that a better price could have been obtained. The executor was surcharged with the amount for which the widow, after conducting the business for some months, sold the stock then on hand, the fixtures, goodwill and lease to a purchaser who with her consent had procured a transfer of the license to himself. It did not appear that the lease had any time to run, or that the executor had not obtained the full value of what he sold. It was said in the opinion that if the executor, by the exercise of diligence, could have procured a higher price for the stock and fixtures from one willing to take the chance of securing a renewal of the lease and a transfer of the license, there would have been reason for surcharging him.

A license to sell liquor is a personal privilege. It is not assignable by the holder and at his death it does not go to his representatives. It is not an asset of his estate: Blumenthal's Petition, 125 Pa. St. 412. An executor or administrator could not under the law carry on the business for the benefit of the estate if he so desired: Grimm's Appeal, 181 Pa. St. 233. But the fact that a license had been granted to sell liquor at a particular place may increase the value of that which the executor or administrator may have to sell. On the hearing of an application for a retail license, the court considers the public necessity of the place as well as the personal fitness of the applicant, and the granting of a license is the finding that the place in its location and appointments is a suitable place for the sale of liquor. The opportunity to secure a transfer of the license and a renewal at the end of the year may materially affect the value of the fixtures, goodwill and unexpired term of the lease. When this is shown to be the case, and the accountant has failed in the performance of a plain duty, there is ground for surcharge.

The order of the orphans' court is affirmed at the cost of the appellant.

GOODWILL—WHAT IS, AND HOW FAR CONSIDERED PROPERTY.—The goodwill is the favor which the management of the business wins from the public and the probability that all customers will continue their patronage: *Vonderbank v. Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336. It is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader: See monographic note to *Tardy v. Creasy*, 59 Am. Rep. 688; *Angier v. Weber*, 14 Allen, 211; 92 Am. Dec. 748.

MEDIA TITLE AND TRUST COMPANY v. KELLY.

[185 PENNSYLVANIA STATE, 131.]

EXECUTION SALE—VACATING.—It is too late to move to vacate an execution sale for inadequacy of price after the sale has been confirmed and a sheriff's deed has been executed and delivered to the purchaser.

EXECUTION SALE—COLLATERAL ATTACK UPON.—It must be presumed, where the law requires sheriff's deeds to be acknowledged in open court, that the court, in taking and certifying the acknowledgment, acted rightly and in accordance with its own rules.

V. Gilpin Robinson and Horace P. Green, for the appellant.

John E. McDonough, for the appellee.

133 GREEN, J. This is an appeal from an order of the court below setting aside a sheriff's sale of lands of the defendants. The sale was made on July 3, 1897. On July 6, 1897, the sheriff's deed was duly acknowledged in open court and was delivered to the purchaser. The whole of the purchase money was paid by the purchaser prior to the acknowledgment of the deed, partly in cash and partly by the proper receipt of the purchaser as first lien creditor on the sheriff's docket. On July 13, 1897, the defendants in the execution presented a petition to the court below to have the sale set aside, and November 3d, following, the rule to set aside the sale was made absolute. On November 8th, the plaintiff presented a petition to have the order setting aside the sale revoked, and on January 7th, the court filed a modified order vacating the record of the acknowledgment and delivery of the deed, and directing the deed to be delivered up for cancellation, the refunding of the hand money paid by the plaintiff as purchaser, and discharging the rule for the revocation of the decree made November 3, 1897.

The exceptions to the sheriff's sale were that a large portion of the land in question, a tract of seventy-one acres, had been subdivided into streets and buildings lots; that the part not subdivided contained a valuable stone quarry, and that neither the subdivision into lots nor the stone quarry was mentioned in the advertisement of the sale. It was also objected that the sale was not advertised as required by law, and that the price realized at the sale was grossly inadequate, but no offer of any higher price was made. The court below, without filing any opinion, made absolute the rule to set aside the sale and the question is, whether there was error in this ruling. The appellant contends that it was too late to set aside the sale for irregularities or inadequacy of price after the acknowledgment and delivery of the sheriff's deed. The rule upon this subject seems to be very well settled. Thus in *Cooper v. Wilson*, 96 Pa. St. 409, which we regarded as an extremely hard case, and would have relieved if it were possible to do so, we said, "It is a familiar principle that a sheriff's sale will not be set aside for mere inadequacy of price: *Weitzell v. Fry*, 4 Dall. 218; *Carson's Sale*, 6 Watts, 140; *Swires v. Brotherline*, 41 Pa. St. 135; 80 Am. Dec. 601. It is true in a clear case of inadequacy of price the court will seize hold of ¹³⁴ a slight irregularity to set aside the sale. But mere irregularities are cured by the acknowledgment of the sheriff's deed: *Crowell v. McConkey*, 5 Pa. St. 168; *Spragg v. Shriver*, 25 Pa. St. 282; 64 Am. Dec. 698; *Shields v. Miltenberger*, 14 Pa. St. 76. . . . We have no doubt that relief might have been granted for the misdescription, had an application been made in proper time. But it was too late after acknowledgment and delivery of the deed and payment of the purchase money. There must be a point of time when such irregularities are cured. The law fixes the acknowledgment of the sheriff's deed as that time. Were we to relax this rule we might imperil titles."

In *Evans v. Maury*, 112 Pa. St. 300, which was a case of alleged fraud upon the defendant in the execution, we held that, after a sheriff's sale has been confirmed, the purchase money paid, the deed acknowledged, recorded, and delivered to the purchaser, and possession of the premises taken by him, the court has no power, upon a rule to show cause, to set aside the sale and compel the purchaser to deliver up the deed to be canceled. The delivery of the deed by the sheriff, after it has been properly acknowledged, the sale confirmed, and the purchase money paid, vests the title in the purchaser. It is a good

title until it is proved that he procured it by fraud upon the defendant in the execution. This must be done either in an action of ejectment or by bill in equity.

In both the foregoing cases the sale was set aside by the court below, but the orders were reversed by this court.

It is contended by the appellees that the record does not disclose any special order of the court fixing July 6, 1897, as a day for the acknowledgment of deeds, and hence the acknowledgment in this case was void. It is not claimed that there was no such order, but only that the record does not disclose it. It is only necessary to say that this contention entirely ignores the rule, *omnia praesumuntur esse rite acta*, and hence is entitled to no consideration. Certainly, it must be presumed, in the absence of evidence to the contrary, that in so important a matter as the acknowledgment of sheriff's deeds, to be done formally in open court, and upon which the title to all lands sold by the sheriff depend, the court acted rightly and strictly in accordance with its own rules. This point does not appear to have been made in the court below, and hence the necessity of ¹³⁵ being prepared with proof on this subject was not apparent to the appellant. But as no proof is required to show that the court obeyed its own rules, the proposition that it did not do so would require much more proof than the mere assertion of counsel that the record did not disclose it affirmatively. However, the counsel for the appellant has furnished us with the official certificate of the prothonotary of the court below, by which it appears that on June 21, 1897, the court did make a formal order for the holding of a court on July 6th, following, for the acknowledgment of sheriff's deeds, the confirmation of accounts, and the transaction of miscellaneous business. The certificate further shows that on July 6th, named in the order, the sheriff appeared in open court and acknowledged fifteen deeds for as many different properties, among which was the deed in question in this case. It would be useless, therefore, to entertain the suggestion made by counsel for the appellees that the record does not disclose the fact, when in truth it does make that disclosure. We cannot discover any sufficient reason for setting aside the sale in this case, and therefore sustain the assignments of error.

The order of November 3, 1897, making absolute the rule to set aside the sheriff's sale, and the order of January 7, 1898, vacating the record of the acknowledgment and delivery of the sheriff's deed, and directing that the same should be surrendered

for cancelation, are reversed and set aside at the cost of the appellees.

EXECUTION—EFFECT OF ORDER CONFIRMING JUDICIAL SALE.—An order or decree confirming a judicial sale is a final and conclusive judgment determining the rights of the parties, possessing the same force and effect as any other adjudication by a court of competent jurisdiction: *Extended note to Watson v. Tromble*, 29 Am. St. Rep. 495. If the owner of property does not object to the confirmation of a judicial sale thereof on the ground of inadequacy of price, he is estopped thereafter to set up such objection: *Hammond v. Cailleaud*, 111 Cal. 206; 52 Am. St. Rep. 167, and extended note; *Roberts v. Robinson*, 49 Neb. 717; 59 Am. St. Rep. 567.

EXECUTION SALES—PRESUMPTION IN FAVOR OF THE VALIDITY OF.—Every presumption is indulged in favor of the regularity and validity of execution sales: *Neal v. Nelson*, 117 N. C. 393; 53 Am. St. Rep. 590, and note. It will be presumed in support of a sheriff's deed that he took the necessary steps required by law to make a valid sale, and sold all that he was authorized by his levy to sell: *Smith v. Crosby*, 86 Tex. 15; 40 Am. St. Rep. 818, and note.

JOHNSTON'S ESTATE.

[185 PENNSYLVANIA STATE, 179.]

PERPETUITIES OR GRANTS OF PROPERTY—WHEN THE VESTING OF AN ESTATE OR INTEREST IS UNLAWFULLY POSTPONED.—Such vesting is unlawfully postponed if the power to alienate may not be exercised during lives in being and twenty-one years and nine months thereafter.

PERPETUITIES.—A devise of land to be held in trust for a term of seventy-five years after the death of the testator is not an attempt to create a perpetuity, and is, therefore, valid, because the estate commences and fully vests on his death.

PERPETUITIES.—The rule against perpetuities is not concerned with anything but the commencing of the estate, and, where an estate commences within the time allowed by the rule, it is not material that it does not terminate until afterward.

ESTATES—WHEN VESTED AND WHEN CONTINGENT.—An estate is said to be vested in interest when there is a present, fixed right in some one to the future enjoyment of it; it is not vested, but contingent, when either the person who is to enjoy it or the event upon which the estate is to arise, is uncertain. If property is devised or bequeathed to such children or child or individuals as shall attain a given age, or the children who shall sustain a given character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class—preceding such restricted description, so that the uncertain event forms part of the description of the devisee or legatee, the interest is necessarily contingent on account of the person. For, until the age is attained, the character sustained, or the act performed, the person is unascertained.

ESTATES—WHEN CONTINGENT AND NOT VESTED.—If lands are devised to trustees to be held for seventy-five years, after which they are to be sold and the proceeds divided among all the

testator's children who may then be living, and the legal descendants of any of his children who may then be dead, such legal descendants to take only such portion as their deceased parent would have taken if living, no estate vests in any child or the descendant of any child until after the expiration of the seventy-five years.

PERPETUITIES—POWERS OF SALE, WHEN OFFEND THE RULE AGAINST.—If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. This happens when the donee of the power and the occasion on which it can be exercised may both, by possibility, be in existence beyond the limits of the rule.

PERPETUITIES—GENERAL SCHEME OF THE TESTATOR.—If a part of the testator's general scheme is that an estate shall be kept entire for an unlawful period, no part of the scheme can be sustained, but the estate to which the void provisions relate vests immediately in the heir.

PERPETUITIES.—WILLS HAVING VALID AND INVALID PROVISIONS.—Where a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole instrument taken together, was evidently never the intention of the testator, otherwise when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.

PERPETUITIES—WHEN A VALID PARTICULAR ESTATE MUST BE PRONOUNCED VOID BECAUSE OF A FORBIDDEN REMAINDER.—If an estate is given to trustees to be held for seventy-five years, and then to be sold and the proceeds divided among persons who cannot be surely ascertained until the time for division, the estate and interest of such persons are so remote as to offend the rule against perpetuities, and, as the manifest object of the estate of the trustees was to preserve the property for distribution at such remote time, it must be regarded as invalid, and the whole property as vesting in the heirs at law of the testator. It is clear that the estate of the trustees and the subsequent estate or interest are not separable, but are so related that to uphold one and avoid the other would defeat the main, if not the only, purpose of the testator in making the devise.

Suit to have a trust attempted to be created by a will declared void. The trial court granted the relief sought.

W. Rush Gillan and J. E. McCune, for the appellants.

Walter K. Sharpe, for the appellee.

The opinion of the trial court was as follows:

"The case as presented raises no issue of fact. The purpose of it, as stated in the bill, is to have a certain devise to trustees contained in the last will of George Johnston, deceased, declared void, and to secure a conveyance to the plaintiff, a cestui que trust, of his proportionate undivided interest in the estate so devised.

"The plaintiff is a son of George Johnston, the testator, and one of the beneficiaries in the trust; and the defendants are all

the remaining children of the testator, one of whom is also the trustee of the estate devised.

"George Johnston, the testator, was at the time of his death the owner of a number of valuable farms. This proceeding relates to six of these which are all included in the one devise in trust—one of them having been added to the original devise by codicil. The devise is as follows:

"I have also five other tracts of land and farms, to wit [describing them as in the petition set out]: I give and devise the said five tracts of land last above described unto my executors hereinafter named, and to their successors in the trust (to be chosen in the manner hereinafter appointed), upon the following trusts and no other, to wit: That the said executors and their successors in the trust shall have, take, and hold the said five tracts of land (subject as hereinafter mentioned) for and during the period of seventy-five years after my decease, and they, the said executors, are to have the exclusive control and management of the said five tracts of land during the aforesaid period, to take, receive and collect the annual rents, issues, and profits thereof, and out of the rents, issues, and profits of the said five tracts of land the said executors shall pay all debts due by me, as well also all charges, interest, dowers, claims, or demands charged upon either of the said five tracts of land, and also all the costs of repair, taxes, and expenses of keeping the same in good repair; they shall also pay out of the rents, issues, and profits of the said five tracts of land all legacies hereinafter bequeathed, as well as the dower and interest on the same in the tract of land herein bequeathed to my daughter, Elizabeth Johnston, and so soon as the net income from the said five tracts of land shall be sufficient to meet all the aforesaid demands, I direct that my executors shall pay the same and make a full settlement of the estate without unnecessary delay, and so soon as the said settlement is made, I direct my children then living to choose some suitable person as trustee and to the person so chosen (or his successor in the case of his death, who shall be chosen in the same way, or in the case of the death of all my children, by a majority of their issue) I give and bequeath all the power and authority necessary to execute this trust. And I hereby direct the said trustee, or his successor in the trust, after collecting the rents, issues, and profits of said five tracts of land and paying out the necessary expense of keeping the same in good order and repair and paying the taxes and a reasonable compensation for his services, shall, annually on the first

day of May in each year during the said period of seventy-five years, divide and distribute among all my children share and share alike and the children of such of my children as may during said period depart this life, the children of such deceased children to have and take, however, only such portion and share of said rents, issues, and profits as their deceased parents would have taken if living. The said mode of distribution to obtain also in regard to said rents, issues, and profits, among descendants of more remote degree than children's children.

" 'And after the expiration of the said period of seventy-five years the said trustee chosen as aforesaid, or his successor in the trust, shall have the right, and they are hereby fully authorized and empowered, to sell said five tracts of land, and to make, execute, and deliver good and sufficient deeds to the purchasers thereof, as fully and completely as I myself might and could do.

" 'The proceeds of the sale of the said five tracts of land to be distributed and divided by the said trustee or his successor, to and among all my children, share and share alike, that may be then living and the legal descendants of any of my said children that may then be dead, the legal descendants of such deceased child or children to take, however, only such share and portion of the said proceeds as their deceased parent would have taken if then living.'

"The testator died May 22, 1884. Within a few years thereafter, the executors, out of the income of these farms (another a stated above having been added by codicil, upon the same trusts), had paid all that had been charged thereon by the will, and the farms then passed under the control of a trustee selected by testator's children in the way appointed.

"The plaintiff contends that this devise by its terms tends to create a perpetuity, and is therefore void.

"The will contains no residuary disposition.

"Conclusions of law.

"1. So much of the devise in trust as attempts the creation of an estate in remainder violates the rule against perpetuities, and is void.

"2. It results that, as to this remainder, George Johnson died intestate, and the estate therein descended to and vested in his heirs at law, of whom the plaintiff is one.

"3. The manifest scheme and purpose of the devise was to make a disposition of testator's estate which the law forbids, and the particular estate devised was attempted solely in fur-

therance and aid of this purpose. It therefore falls under the same condemnation as the devise in remainder, and is void.

"4. The whole devise to the beneficial donees therein named being invalid, George Johnston died intestate as to the beneficial interest in the lands described in this devise, and the plaintiff, as one of his heirs at law, is entitled to the relief prayed for.

"5. There being no other disposition of said beneficial estate or interest in said lands, contained in the last will of George Johnston, the testator, a trust results to the heirs at law of the said George Johnston, deceased, to the extent of the estate given to his executors and their successors in the trust.

"The question presented is an interesting one, and we have given it our best consideration.

"It is, first of all, necessary that we have a clear understanding of what is meant by a perpetuity, and the rule which prohibits grants creating them, or tending to create them clearly stated. Perpetuities have been variously defined, and the rule against them has been expressed with quite as much variety. Whatever confusion there is among the cases, and it is not a little, may be due to this circumstance; but in whatever terms defined or expressed, there is such a uniform and consistent recognition of the essential features and principles in every definition and rule, that, so far as these are concerned, there is no conflict whatever between them. All are not alike clear, but if closely studied, all will be found consistent with each other.

"Nowhere do we find a more intelligible and satisfactory statement of doctrine and rule than is given in the case of *Philadelphia v. Girard*, 45 Pa. St. 26, 84 Am. Dec. 470, in a summary as lucid as it is comprehensive. It is as follows: '1. Perpetuities are grants of property wherein the vesting of an estate or interest is unlawfully postponed; and they are called perpetuities, not because the grant, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or its vesting; 2. The law allows the vesting of an estate or interest or the power of alienation to be postponed for the period of lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently the estate or interests dependent upon them are void, and nothing is denounced by the law as a perpetuity that does not transgress this rule.'

"Next, it is important that we distinguish clearly between the

two separate and distinct estates or interests which this devise attempts to create: First, a term of seventy-five years in a trustee for certain beneficiaries; then, upon its determination, an absolute interest over to those, in effect, who would be entitled to take if the testator had then died intestate. To determine whether the devise is repugnant to the rule, and if so in what particular and with what result, these several estates must be considered separately, since it sometimes happens where several estates are created in the same subject, that while one must fall because of its offense, the other may stand.

"Thus prepared for the inquiry it may not prove so difficult as it first appears.

"First then as to the particular estate—the term for years given to the trustee. There are many reported cases, among them *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, *Deford v. Deford*, 36 Md. 168, *Thorndike v. Loring*, 15 Gray, 391, and *Fosdick v. Fosdick*, 6 Allen, 41, in which devises not distinguishable from this are held to be violative of the rule, on the ground that the trusts of the wills required for their execution a longer period than the rule allows. If the doctrine of these cases be correct, then clearly enough this particular estate offends against the rule; since not only is there a possibility that the seventy-five years from the death of the testator will carry beyond the lifetime of the last surviving child of the testator, with twenty-one years and nine months added thereto, but, in view of the ages of these children, it is altogether probable that this will result. Besides, in such a case as this, a still shorter limit must be applied; for the rule is, that where the testator fails to avail himself of lives in being, and adopts a term of years, without reference to any life in being, the term cannot extend beyond twenty-one years from his death. 'If an absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years': *Perry on Trusts*, 349. So we have a manifest repugnance between the devise and the rule, if the doctrine of the cases referred to be correct.

"It does not appear that these cases have been overruled, yet, Professor Gray, in his *Work on Perpetuities*, pages 166-176, insists that in all of them the rule had been both misunderstood and misapplied. His argument to us seems complete as it is convincing. Beginning with the origin of the rule, and tracing its development through all stages, he shows how in its design, and purpose, and uniform acceptance and application, except in

the cases criticised, it was directed against future contingent interests only, and never could have had any reference whatever to vested estates. In this he is sustained by the terms of every definition that has been given of a perpetuity, and by every authority on the general subject. The cases referred to are not so many attempts to enlarge and widen the rule, so as to embrace other subjects than those originally intended, but, as he insists, proceed upon a misapprehension of its purpose and scope. The variance between them and the doctrine as stated in *Philadelphia v. Girard*, 45 Pa. St. 26, 84 Am. Dec. 470, must strike anyone, and it is impossible to see how both can be correct. The particular estates which they condemn are present vested interests, whereas the rule applies only to future estates. They condemn them because the trusts with which they are clothed may require in their execution a larger period than that prescribed by the rule. But Professor Gray shows, clearly enough, that the rule has no concern with anything but the beginning of the estate; that it requires a vesting within the period, and, where this occurs, the extent of continuance of it is something wholly outside of its operation. And so in section 232 he asserts, as admitted and established doctrine, that an interest is not obnoxious to the rule, if it begin within a life in being and twenty-one years thereafter, though it may extend beyond. The same thing is asserted by Lewis in his *Work on Perpetuities*, page 144, and with equal clearness and emphasis. He says: 'The remoteness against which the rule is directed is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to be determined on the happening of any event, however remote.'

"There is, of course, no disputing such authority as this; and the doctrine is so clearly expressed, as in the authority we have cited from our own state reports, that it admits of no two interpretations. Manifestly, the cases criticised are reconcilable with neither. Applying, then, this doctrine and rule to the particular estate created by the devise we are considering, rather than subjecting it to the rulings made in these cases which have been referred to, it seems, judged of by itself, unrelated to other parts, to stand clear of the rule. Here the particular estate, both legal and equitable, vested at once. There was nothing future about it, except its continuance; it began within the prescribed limits, and it is of no consequence, so far as concerns the rule, that it extends beyond it. Each of the testator's chil-

dren took a present vested interest in the term of seventy-five years, the full enjoyment of which nothing could defeat but his or her death before its expiration; not transmissible because not an estate of inheritance, but otherwise as freely alienable as any other estate or interest. It is impossible to see how the rule against perpetuities can be applicable in such a case as this.

"The ulterior estate, that is, the gift over to testator's children and grandchildren, upon the determination of the estate given to the trustee, must stand or fall by the same test. The determining question must be, Is this a vested interest, or is its vesting suspended until the expiration of the particular estate? If the former, it too is outside of the operation of the rule; but if the latter, the rule necessarily applies and as certainly condemns it; since, if there be any suspension at all, it is for seventy-five years, whereas the utmost limit in a case like this is twenty-one years.

"An estate is said to be vested in interest, when there is a present fixed right in some one of future enjoyment of it; it is not vested, but contingent, when either the person who is to enjoy it, or the event upon which the estate is to arise is uncertain. The rule as stated in *Smith on Executory Interests*, page 281, is as follows: 'Where real or personal estate is devised or bequeathed to such children, or to such child or individuals as shall attain a given age, or the children who shall sustain a given character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For until the age is attained, the character is sustained, or the act performed, the person is unascertained; there is no person answering to the description of the person who is to take as devisee or legatee.'

"In our case, a sale of the land is directed at the expiration of seventy-five years from testator's death, and the proceeds are bequeathed in the following language, 'to and among all my said children, share and share alike, that may be then living, and the legal descendants of any of my said children that may then be dead, the legal descendants of said deceased child or children to take, however, only such share or portion of the said proceeds of sale as their deceased parent would have taken if then living.' There is here no distinct gift to the whole class of children; those only are to take who survive the determination of

the particular estate. The language used makes a fair equivalent of a bequest to such children 'as shall attain a given age.' Not for seventy-five years can there be any person answering to the description of the persons who are to take as devisees or legatees. It is not as though the parties had been individuated, as in McClure's Appeal, 72 Pa. St. 414, where the interest was held to be vested. The peculiar features of that case are said in the subsequent case of Cascaden's Estate, 153 Pa. St. 172, to have controlled its decision. The case last mentioned approaches most closely the case in hand. There the bequest was as follows: 'When the youngest child arrives at the full age of twenty-one years then I direct all my said real estate and investments to be converted into money by my executors, and divided as follows: I give and bequeath to my wife out of said moneys fifteen thousand dollars, and all the rest, residue, and remainder I direct to be divided among my said children, share and share alike, subject to the deduction which I have before directed to be made. Should any of my children die before the youngest child arrives at the age of twenty-one years leaving children, then the said share be divided among said children, share and share alike, or if he or she shall die without leaving children, then his or her share shall be divided among the remaining children, share and share alike.' It was held that the interests given to the children did not vest until the youngest arrived at the age of twenty-one years. In the opinion, the court distinguished clearly between the facts of this and of McClure's Appeal, 72 Pa. St. 414. They said: 'In that case [McClure's Appeal, 72 Pa. St. 414] the testator directed the residue of his estate, if any, remaining after the death of his wife, to be equally divided between his nephews and nieces, individuating them by their names, and declaring that each is to have an equal share. It was said in the opinion of the court, "The gift is to his nephews and nieces, not as a class, but by name as individuals, without words of survivorship, and with no bequest over, in the event of their death, in the life of the widow." Herein that case differs from the one in hand. In the latter the testator does not individuate his children and give each one a share by name. In fact, the names of his children are nowhere mentioned in the will. The gift to them is to a class, and the distribution is to be made among them share and share alike when his youngest child shall arrive at the age of twenty-one years and the share of such child as shall die before that period, without leaving children, shall be divided among the remaining children, share and share alike.

It is obvious that had Mrs. Manrise [a daughter of the testator] died prior to the distribution without leaving children, her share would have gone to the surviving brothers and sisters under the terms of the will. But it was contended that because she left a child surviving her, her interest in the estate vested in her descended to and vested in her child. Had this child lived until the period of distribution, there can be no doubt she would have been entitled to her mother's share. As she died before that time, to hold that she is entitled to her mother's share is to accord to her a higher estate than her mother possessed. The estate of the latter was contingent upon her living until the youngest child came of age.'

"In the present case it is the event—that is, the determination of the term of years—that is to indicate which, if any, of the testator's children or grandchildren are to take; the taking is made contingent upon their surviving that period.

"Many authorities might be cited in support of the view we take of this part of the devise in question, that its effect is to create a future contingent interest, but it is hardly necessary to do more than we have. What gives it greater confirmation than any adjudication upon a case with general features the same—since all the cases are more or less distinguishable from each other, and each stands upon its own peculiarities—is the undisguised and unmistakable purpose of the devise to accomplish this very result, as manifest we think as though expressed in words. After all, it is the intention of the testator that governs. It is impossible, as we read this will, to conclude that the testator intended that any of his children should take an estate or interest in the remainder which would be transmissible or alienable, during the continuance of the particular estate. And yet to hold these interests vested would give them this quality. On the contrary, it is obvious that the testator's chief and controlling purpose throughout was to tie up his estate, and hold it intact beyond the power of either children or grandchildren to interfere with the final distribution he proposed at the end of seventy-five years.

"And it may be that we must yet allow to this purpose a still wider and more controlling effect, since having determined that this ulterior estate is a future contingent interest, repugnant to the rule and therefore void for remoteness, it remains to consider in what condition this leaves the particular estate. As we have said, this latter, standing by itself, unrelated to other parts, does not offend against the rule; but this needs to be

qualified somewhat. The estate it grants is free from offense, since it is freely alienable and in no sense tends to a perpetuity; but it contains a power to sell which flatly contravenes the rule and which dare not be exercised. The rule with respect to powers contained in a grant is the same as that which applies to estates. 'If a power can be exercised at a time beyond the limits of the rule against perpetuities it is bad. This happens when a donee of the power, and the occasion on which it can be exercised, may both, by possibility, be in existence beyond the limits of the rule': Gray on Perpetuities, 306.

"So, then, we have nothing left to this whole devise, but a simple estate of seventy-five years in a trustee, every other interest in the land passing directly and immediately to the heirs of George Johnston, the testator; in other words, the heirs taking the fee in the lands subject to this term of years, if the latter be allowed to stand. The result would be easily reached if the beneficiaries under the trust were the 'heirs' of the testators; but they are not, the gift is to his children and the legal descendants of such as shall die during the period.

"The rule with respect to void ulterior limitations is stated by Lewis, in his Work on Perpetuities, page 420, as follows: 'As to prior limitations, the invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been omitted entirely from the disposition scheme. . . . A limitation of a life estate, or other partial interest, with a remainder expectant upon it, which is void for remoteness, of course remains in statu quo prius; neither receiving enlargement nor suffering diminution.'

"If this rule admits of no exception, but is to be applied in every case, then this particular estate must stand. But that is a conclusion that it would seem ought, if possible, to be avoided, for the devise, stripped of the power of sale and avoided as to the larger estate over, cannot with any reason be said to express the testator's wishes. It will not be pretended that the particular estate was designed to serve any purpose of its own, distinct from the limitation over. On the contrary, it is evident that it was adopted simply as a means to an end; a hook upon which to hang suspended a tied-up estate, until such time as testator desired it to be opened and parted. How does it in any way enforce testator's wishes to leave the hook in its place, when there is no estate to suspend upon it? The estate which he expected to suspend for seventy-five years, if we are right in our previous conclusions, the law has disposed of, vested it at

once in his heirs, who have the right to dispose of their interests therein at any time. The whole scheme of the testator in this regard has been defeated. Instead of observing his will, is it not rather enforcing one not his, to keep alive under such circumstances an estate which he contemplated only in connection with another and larger one which the law has annulled?

"It would seem that such a case ought upon reason to be excepted out of the general rule. In *McSorley v. Leary*, 4 Sand. Ch., 7th L. ed., 414, 1154, it is held that if a part of testator's general scheme is that the estate shall be kept entire for any unlawful period, no part of the provisions can be sustained, but the estate to which the void provisions relate will vest immediately in the heir.

"When a will contains distinct and independent provisions, so that different portions of the property or different estates or interests in the same portions of the property are created, some of which are valid and others invalid, the valid will be preserved, unless those which are invalid and those which are valid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator": *Haxtun v. Corse*, 2 Barb. Ch., 5th L. ed., 506, 732. The rule is stated in argument in *Darling v. Rogers*, 22 Wend. 495, as follows: 'Where a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as from the whole instrument taken together was evidently never the intention of the testator. Otherwise, when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.' In *Hawley v. James*, 16 Wend. 61, in which the decision of the chancellor was reversed, it is distinctly asserted in the opinion of the chief justice that valid life estates prior to void remainders will not be upheld, if upholding them would work injustice and defeat the main object of the testator. Professor Gray in his *Work on Perpetuities* clearly recognizes such exceptions to the general rule. In discussing those cases which seem to have overlooked that part of the rule which makes it applicable only to future contingent interests, he makes special reference, on page 172, to the case of *Thorndike v. Loring*, 15 Gray, 391, which of all the cases we have seen most nearly approaches this in its essential features. In that case a fund was given by will to trustees for fifty years (it is of no consequence in this connection that it was given to accumulate); then to be paid over to those who would be entitled to the testator's estate if he had died intestate. The

court held that the gift to the trustees was void for remoteness; that therefore the whole trust fell; that a residuary clause in the will took effect; and that the estate passed at once to the residuary legatees. Professor Gray shows that the particular estate did not offend against the rule; that it was good in law or equity, though the ulterior gift was not. Nevertheless, he sustains the action of the court in setting aside the whole trust, in the following language: 'It may be fairly urged in support of the decision in *Thorndike v. Loring*, 15 Gray, 391, that the trust was created solely for the purpose of making an invalid gift, and that its sole object being illegal, the whole trust failed.'

"It is equally clear that in the present case, the only purpose the testator had, in connection with the trust he established, was to make an invalid gift. His aim was to control the disposition of his property beyond the period that the law allows, and this devise was the scheme adopted to accomplish it. It was a manifest attempt to accomplish an illegal object, and for this reason, if for no other, the whole scheme should fail. A like result follows from the circumstance that the two estates are not separable; that is to say, they are so related that upholding the one and avoiding the other would clearly defeat the main, if not the only purpose of the testator in making the devise. No cases are to be found in Pennsylvania supporting the view here expressed; but neither can any be found which are in conflict with it. There are cases—*Lawrence's Estate*, 136 Pa. St. 354, 20 Am. St. Rep. 925, and others—which recognize the general rule as stated by Lewis, viz., that a prior estate neither receives enlargement nor suffers diminution when a remainder expectant upon it is declared void for remoteness; but the question whether this general rule admits of exceptions is nowhere discussed in any of them. Elsewhere, we have seen, the rule is not invariably applied, and a recognized exception is where, as in this case, the failure of the ulterior estate disturbs so as to defeat the main and dominant purpose of the testator. Another is where the particular, prior estate is adopted as a means for the accomplishment of that which the law forbids. The present case falls within both exceptions.

"Our conclusion is, that the devise of the six several tracts of land described in the bill, contained in the last will of George Johnston, deceased, is wholly and entirely void, and that as to these lands the said George Johnston died intestate.

"It follows that the plaintiff, who is a son and heir at law, is entitled to the relief prayed for."

On appeal, the supreme court affirming the judgment, said:

193 **PER CURIAM.** The very able and exhaustive opinion of the learned court below in this case is so full and complete, and evinces such a painstaking care in its preparation, and is so entirely satisfactory to us, that we adopt it as the opinion of this court, and on it we affirm the decree of the common pleas.

Decree affirmed, and appeal dismissed at the cost of the appellants.

WILLS—RULE AGAINST PERPETUITIES—TRUSTS.—The rule against perpetuities is that no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest: *Madison v. Larmon*, 170 Ill. 65; 62 Am. St. Rep. 356. If the estate vests within the time required by the rule against perpetuities, it is not material that it may continue beyond that time: See monographic note to *In re Walkerly*, 49 Am. St. Rep. 119. A perpetuity will be no more tolerated when covered by a trust than when it displays itself undisguised in the settlement of a legal estate. So a devise of certain property to trustees for a specified purpose, accompanied by a provision that no final sale or distribution of the trust estate shall take place during the life of the testator's wife, but only after the expiration of twenty-five years after his death, and after her death, attempts to create a perpetuity and will not be sustained: *In re Walkerly*, 108 Cal. 627; 49 Am. St. Rep. 97, and monographic note discussing the rule against perpetuities.

PERPETUITIES—RULE AGAINST, AS APPLIED TO POWERS OF SALE.—Generally, a power of sale cannot be sustained unless it must be exercised within the limits of the rule against perpetuities: See monographic note to *In re Walkerly*, 49 Am. St. Rep. 133.

ESTATES—WHEN CONTINGENT AND NOT VESTED.—Contingent remainders exist when no present interest passes and the estate in remainder is limited to take effect, either upon a dubious and uncertain event, or to a dubious and uncertain person, so that the particular estate may be determined and the remainder never take effect: *Chapin v. Crow*, 147 Ill. 219; 37 Am. St. Rep. 213; *Ducker v. Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135, and note. See *Madison v. Larmon*, 170 Ill. 65; 62 Am. St. Rep. 356, and note.

WILLS—INTERPRETATION—VALID AND INVALID PROVISIONS.—When some of the trusts of a will are legal and others illegal, if they are so connected as to constitute an entire scheme, so that the wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be considered together, and all must be held illegal and must fall: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487; *Cross v. United States Trust Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597, and note.

Of the Severability of Perpetuities and Forbidden Trusts.

In perhaps a majority of the instances in which it appears that a disposition of property or a scheme for its disposition, would, if fully carried into effect, create a perpetuity or a forbidden trust, some part, and often a very considerable part, of the scheme may

be accomplished without the creation of either, and then this question is inevitably presented: May the scheme be pursued and sustained so far as legal, or must the legal be regarded as inextricably mingled with the illegal, and hence pronounced void, and the property entirely freed from the disposition attempted to be made of it. This question was referred to and briefly considered by us in our note to *In re Walkerly*, 49 Am. St. Rep. 136, but its difficulty and frequent recurrence warrant our giving it further consideration in connection with the principal case. In truth, there is rarely a case in which an attempted disposition of property is assailed either on the ground that it attempts to create a perpetuity or a forbidden trust that the reply is not made that the part which offends the law may be eliminated from the scheme, and therefore that it cannot infect the residue; and the question thus presented is, in our judgment, the most difficult of solution of any connected with the subject of perpetuities and forbidden trusts. This difficulty, as we shall show, is not in the formulation of rules by which the question must confessedly be decided, but is in the application of those rules to the schemes or attempted dispositions of property which are, from time to time, presented to the courts. The principal case is one which might well be selected as better adapted than any other to illustrate the subject under consideration. The testator devised real property to be held by his trustees and their successors for seventy-five years, during which time its income was to be distributed among his descendants, after which the property was to be sold and its proceeds divided among his children then living, share and share alike, and the descendants of such of his children as should be dead. The testator's scheme, in so far as it involved the creation of a trust estate to continue seventy-five years, including the distribution of the income of the trust property during that period in the manner contemplated by him, did not offend any law of the state, because no provision of such law prohibited an absolute estate vesting in lives in being, though continuing for a fixed term of years which might not end until after the death of all persons in being at the vesting of the estate. If, therefore, the direction for the sale of the property and the distribution of its proceeds after the close of the term of years could be eliminated from the scheme, a valid trust for the term of seventy-five years must be affirmed with an estate in remainder at all times after his death vested in the heirs at law of the testator. But the construction given the will by the court was that violence must be done to its provisions if it were held that his heirs had any vested interest during the continuance of the term of years, and to disregard the direction to distribute the estate, as provided in the will, after the lapse of the term, leaving the balance of the will to stand, would be, in effect, to make a new will and one to which it could not be known that the testator would have given his assent had he been informed. In his lifetime, that the whole scheme contemplated by him could not be given effect. Hence the adoption by the court of the general rule, "that if a part of the testator's general scheme is that an estate shall be kept entire for an unlawful period, no part of the pro-

visions can be sustained, but the estate to which the void provisions relate will vest immediately in the heir."

Whether the case presented for consideration involves an attempt to create a perpetuity or a trust some part of which is prohibited by law, the same general principles must control its determination, and therefore it is not necessary to separately consider these two classes of cases: *Barnum v. Barnum*, 26 Md. 119, 171; 90 Am. Dec. 88; *Deford v. Deford*, 36 Md. 168; *Thorndike v. Loring*, 15 Gray, 391. A testatrix devised and bequeathed her property to be held in trust and placed at interest until her youngest grandchild should, if living, reach twenty-one years of age, and provided that the income should be paid to her grandchildren until the last of them should be dead, after which the property should be distributed among the heirs at law of her grandchildren. The testatrix left children surviving her, and hence it was possible that grandchildren might be born after her death entitled to the benefits of the trust, and that there would be interests under it which would not vest within lives in being at the death of the testatrix. It was held: 1. That the will was an attempt to create a perpetuity; and 2. That the provisions of the trust otherwise valid could not be enforced, the court saying: "And since it is found that the bequest was illegal and void, everything that is auxiliary to the design to carry into effect the provisions of the will in relation to them must also be considered as unauthorized and inoperative": *Fosdick v. Fosdick*, 6 Allen, 48. A will was made by a testator by which he gave one-half the estate to trustees for his daughter for life, with remainder to the issue of her body living at his death, the shares of such as might be infants to be held for them until they should be twenty-five years of age, and then delivered to them. It was held: 1. That all the children of the testator, whether born before or after the testator's death, were entitled to participate in the will; 2. That it resulted from this that alienation might be impossible until after the expiration of lives in being at the death of the testator; 3. That there could be no division of the trust so as to give the property to such children as were in being at the testator's death; and hence 4. That the trust, being altogether void, no action could be maintained by the trustees: *Thomas v. Gregg*, 78 Md. 545; 44 Am. St. Rep. 310. A bequest was made to trustees of property to be converted into cash, and from the proceeds to pay to each of testator's three daughters for their lives, and, at the death of each, to pay to her children an annual sum until twenty-five years of age, at which time each grandchild was to have ten thousand dollars, and the residue was then to be divided among the testator's grandchildren. The decision in this case affirmed all the propositions affirmed by the Maryland case last quoted. When in this case it was sought to have the law so construed as to avoid the rule against perpetuities, the court said: "But such was not the intention expressed by the testator in his will, and such a construction would tend to abrogate the law against perpetuities altogether, whereas it is the duty of the courts to give it effect, and not to destroy its efficiency by adverse construction." Speaking of the attempt to have the will carried into effect as to

the grandchildren in being at the death of the testator, the court said: "We think, also, that to declare this clause of the will valid as to such of the children of these three daughters as were born before the testator's death, or as to them and such as may be twenty-five years of age at their mother's death, and invalid as to any others, would be to make a different will from the one made by the testator, who intended equality among the members of this class of his grandchildren, and especially would this be the result when it is seen that such after-born grandchildren would be excluded altogether from the residuary clause. Then again, the execution of these provisions of the will thus emasculated would be dependent upon carrying into effect the trust scheme devised by the will. But this trust itself violates the rule by making provisions for tying up the estate for a longer period than that fixed by that rule, and therefore cannot be sustained." Again: "We see no way by which a division of the trust created by this will can be made, and part held valid and the rest invalid, without doing violence to the intention of the testator. It is all one scheme, and although the trust is an instrument to effect the beneficial purpose of the testator, it is made the most prominent feature of his will": *Lawrence v. Smith*, 163 Ill. 149. A testator gave life estates in three tracts of land to his three children with remainder over in each case to the body heirs of such children. It was held that this tied up the estate for more than two lives in being, and hence the will was, as to such property, void: *Trufant v. Nunnally*, 106 Mich. 554. A testator gave his property to his widow for life and after her death to his children for life, and after her death to the testator's grandchildren, and after their death, to his grandchildren. With respect to the question whether the whole will was void, or whether it might be carried into effect as to the limitations which were valid, had they stood alone, the court said: "The remainder in fee to the great grandchildren being void, it must, therefore, remain in the heirs at law, and cannot be divested by anything the will contains. Upon these premises these questions arise: What becomes of the estate of Mary Lockridge, widow for life, of Charles R. Lockridge, son for life, remainder to his children for life? Do they share the fate of the clause which attempts to give to the great grandchildren an estate in fee, or is the will void only in so far as it exceeds the limitations prescribed by law? On this point, Sir William Grant in *Leake v. Robinson*, 2 Meriv. 363, remarked: 'Perhaps it might have been as well if the court had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled.' 'Where the limitation which would fall within the allowed limit is so bound up with one which falls without the same as to constitute, in fact, but one disposition of the property, there the common law will not interfere to save the prior limitation': 2 Lead. Cas. Am. Law Real Prop. 488. See, also, *St. Armour v. Rivard*, 2 Mich. 294, where the same doctrine is announced after an able and elaborate citation and review of the authorities. To the same effect are *Donahue v. McNichol*, 61 Pa. St.

78; *Hawley v. James*, 16 Wend. 120, 121, 128. Guided by these authorities, it must be held that the third clause of the will, constituting, as it does, but one disposition of the 'home farm' must fall in toto, and that this piece of property must go to the heirs at law": *Lockridge v. Mace*, 109 Mo. 168.

The case of the Will of Butterfield, 133 N. Y. 473, is also, we think, very pertinent. A testator bequeathed one-third of his estate to his wife, and the rest to his seven children, naming them, and his grandson, George, to be equally divided among them, share and share alike, except that as to his daughter, Harriet, whose share should be but one-half that of the other children, and he further directed that the several legacies be paid to the legatees within one year after the youngest of the children should arrive at twenty-one years of age. He further nominated his wife and his son executrix and executor of the will, and gave and devised all his property to his wife in trust for the payment of his debts and the legacies above described, with power to sell or dispose of the property at public auction at such times and upon such terms as to her should seem meet, provided that no part of his real estate should be sold until each of his children should have attained the age of twenty-one years. At the time of his death, all of his children survived, and five were minors. His wife thereafter died, and an application was made to appoint a trustee in her place. This was resisted on the ground that the whole trust was void in unlawfully suspending the power of alienation. To this it was answered that the unlawful restriction against alienation might be cut off and disregarded, and the power in trust "be allowed to stand free from the prohibitions declared." To this the court answered: "It is quite true that cases occur in which that sort of judicial remedy is applied in order to save valid trusts from the peril of some unlawful incident or limitation. But the doctrine is only applicable where the vicious provision is clearly separable from the valid devise or trust and may be disregarded without maiming the general frame of the will or the testator's substantial and dominant purpose. This is not such a case. The power is given explicitly upon condition, and only upon condition, that it shall not be exercised until the five minor children have all become of age; and the prohibition not only forms an essential element of the power as given, but it cannot be disregarded without also destroying the general scheme of the will and frustrating the testator's purpose. What that was is very plain. He first gave to his wife one-third of all his real and personal estate, and divided the residue among his eight children and one grandson, but specifically provided that their shares should be paid to them within one year after the youngest should reach the age of twenty-one years. He names his wife and one son, Duane, executor and executrix, and then gave to the wife and mother a discretionary power of sale, but expressly directed that it should not be exercised until the majority of the youngest child. His manifest purpose, and almost the only one which made his will necessary, was to keep the real estate unsold and undivided, so that it might serve as a home for his family until the last period of infancy had passed and the ultimate division was

to occur. To strike from the power of sale the expressed restraint upon its exercise would materially change the character and purpose of the power and imperil the vital intention underlying the will. We are not at liberty to go so far. Without, therefore, considering whether this trust power could or could not be exercised by an administrator with the will annexed, it is enough to say that the court will not appoint a new trustee in room of one deceased, if it is plainly and clearly apparent that the trust or power in trust is void."

The case of *Knox v. Jones*, 47 N. Y. 389, is analogous to the principal case. Testator bequeathed property to his executor in trust, to pay the income to W. B. J. during his life, and upon his death the income to be divided equally and paid to C. and G. during their lives, and upon the death of both the whole estate to pass to their children, et cetera. It will be seen here that the trust to pay the income of W. B. J. during his life, if it stood alone, was perfectly valid, but, under the statutes of New York, the trust to pay the income to him for life, and after his death to C. and G. during their lives was invalid, because it suspended the power of alienation for more than two lives in being. The court said: "The trust created was an entirety, and cannot be voided in part and sustained in part. The trust is to receive and pay over the income for three lives, his brother for his life, and then to his two sisters, with cross-limitations over as between them, and the vesting of the estate in those to whom it is ultimately limited and given cannot be accelerated for no other reason than that it cannot be known who will be ultimately entitled under the will, until the death of the last sister, for then, and then only, is the limitation over to take effect. A decree or judgment declaring the trust good for two lives, and determining the trust upon the death of the sister first dying, would not accelerate the vesting of the estate in those ultimately entitled," The court further distinguished that case from other New York cases which had been cited to it holding the trusts involved in them to be separable, and said: "Here there is no separate trust which is void and which can be separated from the others. The one trust is void, because by it the absolute ownership of the property is suspended for more than two lives grouped together, not only as cestui que trust, but as indicating the limit of the trust as to time, and the consequent suspension of ownership. If it were allowable to sever lives thus grouped, dropping out all that might be in excess of two, and to cut off one or more of the several cestui que trust, all of whom are provided for in a single clause of the will, and, in pursuance of a single intent of the testator, all being embraced in a common purpose, all the trusts which have been adjudged void might have been sustained in part instead of being void in toto. The intent of the testator was to make provision for his brother and sisters from the income of his estate during their lives, and the life of the survivor, and that the corpus of the estate should be inalienable until the death of all, and to this end the property, real and personal, was devised to the executor in trust for the purposes named, and the will is not that there can be no vested estate in remainder in the personalty, no ownership under the limitation over until the

death of the three cestui que trust for life. The bequest of the personality to the executor upon the trusts named must, therefore, be declared void, and that portion of the estate distributed to those entitled as in the case of intestacy": *Knox v. Jones*, 47 N. Y. 398.

In a case where trusts were created in favor of several children of the testator which, as to one only of these children, transcended the law, the court said: "We should feel disposed to sustain the trusts in favor of the other children, except, for the reason to uphold those while setting aside the trust in favor of Anna Augusta would seriously interfere with the intention of the testator, that all the children and their issue should share equally in the estate, and would produce great injustice. The result of sustaining the trusts in favor of the other children would be that each would take one-fourth share of the estate and also as heirs and distributees and equally share with Anna Augusta in the share intended for her. No case, we think, can be found which justifies upholding a part of the will, when, by doing so, it would produce manifest injustice. We are of opinion, therefore, that the trust attempted to be created by the testator in the two-thirds of his estate cannot be sustained, and that as to such two-thirds part he must be deemed to have died intestate": *Benedict v. Webb*, 98 N. Y. 466. In what is known as the *Tilden Will Case*, in which the appellants sought to invoke the aid of the principle "that where several trusts are created by a will, which are independent of each other and each complete in itself, some of which are lawful and others unlawful, and may be separated from each other, the illegal may be cut out and the legal permitted to stand, the court of appeals answered: "This rule is of frequent application in the construction of wills, but it can be applied only in aid or assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule, as applied in all reported cases, recognizes the limitation that, when some of the trusts in a will are legal and some illegal, if they are so taken together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and the other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trust must be construed together, and all must be held illegal and must fall": *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 494. The court further said in this case that "the nature of the estate which the testator intended to convey to his trustees, and the nature of the power intended to be delegated to them, is of importance in ascertaining his intent, and determining what was the scheme that he had for the disposal of his property."

Perhaps the apparent conflict of authorities upon this subject may be reconciled by stating the rule to be that inquiry should be made respecting the main scheme of the testator, and that if that scheme be found valid, it will not be destroyed by provisions or limitations which offend the law against trusts or which effect an illegal suspension of the power of alienation. If, on the other hand, this

main scheme or purpose is invalid, the whole bequest must fail, though it contains separable provisions or limitations, some of which, if standing alone, might be allowed effect: *In re Walkery*, 108 Cal. 644; 49 Am. St. Rep. 136; *Holmes v. Mead*, 52 N. Y. 345; *Champlin on Restraints of Alienation*, sec. 481. Thus where a testator devised property to his trustees directing them to invest the sum of thirty thousand dollars, and pay out of the income of this investment to his daughter, Mrs. Harris, during the term of her natural life, an annuity of seven hundred dollars, and on her death to continue this annuity in favor of her daughter for life, and to devote the residue of the property to other purposes designated in the will, it was seen that the main purpose of the testator was to keep the property in the hands of his trustees for a forbidden purpose and for a forbidden period of time, and hence it was said: "This trust is entire, and the annuity to Mrs. Harris and her daughter cannot be sustained": *Harris v. Clark*, 7 N. Y. 242.

In *In re Walkery*, 108 Cal. 647, 49 Am. St. Rep. 136, it was conceded by the court that the trusts themselves were valid in so far as applicable to life estates, and that the only ground upon which the will there was declared invalid and the property left to the testator's next of kin was, that the period designated for the termination of the trust was too remote. An examination of that case will show that the testator, after making certain bequests, gave his wife an annuity for life, and devised and bequeathed his property to the trustees named in the will in trust, to take possession of and manage it, and collect the rents and profits therefrom, to pay: 1. The annuity to the wife for life; 2. The annuity to a sister for life, and, on her death, to her husband for life; 3. To distribute the residue of the rents and profits among the testator's nephews and nieces. For the purpose of carrying out these trusts, the trustees were given power to sell and convey all the trust property at the expiration of twenty-five years from the death of the testator, and to distribute the proceeds equally among his nephews and nieces, the descendants of any nephew or niece taking the share which his or her father or mother would take if living. The final sale or distribution was, however, not to take place until twenty-five years after the testator's death. The court said, respecting these trusts: "So far, then, as concerns their objects and purposes up to this point, they contravene no law and are undoubtedly legal. But there is still to be considered the life of the trust—the event upon the happening of which, or the time upon the arrival of which, the testator has declared it shall cease and determine." The court, further referring to the object of the testator, said: "His special purpose was to preserve the property unaliened and unalienable for at least twenty-five years; for a longer period if his wife should live longer, but, if she should die sooner, still for twenty-five years. This purpose is made manifest, not only from the clauses of the trust already discussed, but in addition by the exemption of his property from the operation of the power of sale conferred in the seventh paragraph of the will." Further the court said: "No other conclusion, therefore, can be reached than that the general purpose of the

testator as to all his property, clearly expressed by his will, was that it should be held by the trustees for twenty-five years before distribution, and that his special purpose as to that particular property entitled the Walkerly Block was that in no event should it be sold or aliened before the expiration of twenty-five years from his death." In the same case it was further said: "The perpetuity here does not result from too remote limitations or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law. Nor is the twenty-five years a condition which may be rejected as void because repugnant to the interest conveyed. It is a limitation, a restraint upon alienation, forming an integral part of the trust. To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, legal purpose, and a legal term. While equity will, in certain instances, make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail. Of the express trusts permitted by the statute there are two great classes, one of which does, and the other does not, involve a suspension of the power of alienation. Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and there, consequently, a sale by him would be in direct contravention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry."

The case of *Haynes v. Sherman*, 117 N. Y. 433, was also much like the Walkerly case. A testator devised and bequeathed his property to his wife, to hold in trust, and use as much of the income as she deemed necessary for her support and that of her children until the youngest should arrive at the age of twenty-one years, or would arrive at that age if living, at which time the testator directed that his estate be divided among his legal heirs then living in such manner and proportion as they and each of them would be entitled to under the laws of the state of New York, had he died intestate. It was claimed: 1. That the directions of the testator, if legal, might result in the prevention of the alienation of the legal estate beyond two lives in being at his death; 2. That the invalid direction in the trust to retain the property until his youngest child would reach twenty-one years of age, if living, might be disregarded and separated from the trusts, and that the trusts not infected by the illegal purpose of the testator might be permitted to stand. The court, however, denied that the trusts were separable, saying: "The courts will strive to uphold so much of a will as they can without frustrating the main intention of the testator or violating any rule of law. Here it is clear that the testator meant that the trust should last, not only during the life of his grandchild if he should die before twenty-one, but until the time he would reach twenty-one if living. It is the same as if he had created a trust to last until the tenth day of December, 1893. It was then, and not until then, that he meant his estate should be divided among his legal

heirs living at that time. There are not two trust terms, but one, and there is but one trust, and hence no part of the trust term can be cut off, and no part of the trust can be disregarded for the purpose of rendering the remainder of the trust valid."

A testator bequeathed certain leasehold estates to trustees, to permit his grandson B to take the profits thereof during his life, and after his decease to permit such persons who, for the time being, would take by descent as heir male of the said B to take the profits until some such person should attain the age of twenty-one, and then to convey to such person, his executors, administrators, or assigns, but if no such person should live to attain the age of twenty-one, then a trust to permit such person or persons successively who for the time being would take by descent as the heir male of the body of the testator's son (father of B), to take the profits until one of them should attain the age of twenty-one years, and then to convey to such heir male first attaining that age, his executors, or assigns. The grandson B died leaving a son and heir, A, who attained the age of twenty-one years, and entered into possession of the property. It was held, however, that he had not a good title thereto; that the bequest to the heir male of the grandson attaining twenty-one years was void for remoteness, and therefore that the next of kin of the testator at his death became entitled to their distributive share of the property on the death of the grandson: *Dungammon v. Smith*, 12 Clark & F. 546. See, also, *In re Hargreaves*, 43 Ch. Div. 401.

While we think it true beyond question that a disposition of property involving a perpetuity or forbidden trust must wholly fail when its unlawful part is an essential part of the scheme of the testator, so that it cannot be assumed that he would have made the valid part of the disposition if he had known that the remainder of it could not be carried into effect, it is equally true that every scheme for the disposition of property, though containing some element of invalidity, may be given effect in so far as valid, if by doing so, the general intent of the testator can be realized: *Loverling v. Worthington*, 106 Mass. 86; *Darling v. Rogers*, 22 Wend. 495; *Money Penny v. Dering*, 2 De Gex, M. & G. 145; *Arnold v. Congreve*, 1 Russ. & M. 209; *Gooding v. Read*, 4 De Gex, M. & G. 509; 21 Beav. 478; *Longhead v. Phelps*, 2 W. Black. 704. This general rule and its limitations are well stated in the quotations from the New York reports on page 190 of the opinion in the principal case. The only difficulty, as we have already suggested, is in applying conceded rules to the cases which are presented to the courts for consideration. In this application decisions have been made which we know not how to reconcile with one another, but none of them have undertaken to dispute the general rule stated in the principal case. In *Estate of Hendy*, 118 Cal. 656, it appeared that property was bequeathed to trustees to be held in trust for the benefit of the testator's niece, to be paid to her monthly, and, at her death, to be continued to her two children until each should reach twenty-five years of age, when the fund was to be paid to them share and share alike. It was said that this will created two independent trusts, one

for the benefit of the niece and the other for the benefit of her children, that the first trust, being in no respect dependent on the second, could not be affected by any invalidity of the latter, and therefore that it was error for the court to decree a distribution of the fund absolutely to the niece. Whatsoever, however, was said upon the subject was manifestly a dictum, for the reason that both of the trusts were absolutely free from any element of invalidity whatsoever. A testatrix gave an estate to her trustee to pay the income to her daughter during life, and made a provision for the disposition of the property after the death of the daughter which violated the rule against perpetuities. It was held, however, that the daughter was, during her lifetime, entitled to the income, that her right would terminate at her death, and that the fee would vest in her as heir at law subject to the trust: *Landers v. Dell*, 61 Conn. 189. This is entirely consistent with the rule as we have stated it, for the reason that it is apparent that under every conceivable contingency the testatrix desired her daughter to have the income of the property during her life. A similar conclusion was reached in a case presenting substantially the same features by the same court in 1898: *Security Co. v. Snow*; and also by the court of appeals of Maryland in 1874: *Goldsborough v. Martin*, 41 Md. 488; and in Massachusetts: *Lovering v. Lovering*, 129 Mass. 97. In *Harrison v. Harrison*, 36 N. Y. 543, 547, it was said that "the principle is now well settled that the courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator, and that this rule is applicable to a single trust created for two purposes, one of which is lawful and the other unlawful." In this case it appeared that a testator devised his property upon trusts to collect, manage, lease, and dispose of it, and to sell and convey it, and with the proceeds to improve certain parts of his estate, and generally to manage the estate and collect the income thereof and to pay one-third of the net income to his wife for life and the remaining two-thirds during her life, and all the net income after her death, to his six children during their respective lives. The will also contained provisions that if any of the children should die before reaching twenty-one years of age, his share should revert to, and become a part of, the residuary estate for the benefit of the other heirs. It was held that the limitations respecting the children who should die were void, but that the dispositions prior thereto became valid and would be supported. A testator devised and bequeathed his estate to trustees to pay the income thereof to his wife for life, and after her death to his two daughters for their lives, and after the death of the wife and daughters, he bequeathed the estate to the issue of his daughters. It was held that the provision in favor of the wife was sustainable, though the other part of the testator's scheme was not, on the ground that the provision in favor of the wife was not "inseparably connected with, or dependent upon, the other dispositions of the will, especially the devise to the daughters and their children as a part of the general scheme of the testator for the disposal of the property": *Van Schuyver v. Mulford*, 59 N. Y. 426. So in

Purdy v. Hayt, 92 N. Y. 446, it was held that where a precedent and particular estate is given to several persons as tenants in common, the remainders limited upon the estates of a part of the tenants in common may fail without affecting the remainders limited upon the estates of the others. A testatrix devised her estate to trustees to be divided into six equal parts, four of which were directed to be invested and the income paid her children for life, and upon their respective deaths the share of the one so dying to be transferred to his or her child or children upon arriving at majority and to the lawful issue of any child who may be deceased. The will further provided that if any such child should die before the age of twenty-one without lawful issue, then the share or portion of the one so dying should become and form part of the residuary estate for the benefit of all the children. It was held that the will created four separate trusts to continue during the lives of the beneficiaries respectively, that the limitation over in case of "such children" as should die without arriving at majority without issue meant the children of the life tenants, and not of the testatrix, but that such limitation, though invalid, would not be allowed to invalidate the primary dispositions of the will. The court said: "It is very evident that the ulterior contingent limitation is quite separable from the primary trust and merely incidental, its only purpose being to provide for a contingency which may never arise, and the failure of that provision would not affect the general scheme of the testatrix. In such case the rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety as well as in the case of a limitation of a legal estate": *Tiers v. Tiers*, 98 N. Y. 568, 573. This same general principle was reaffirmed by the same court in *Henderson v. Henderson*, 113 N. Y. 1. A trust was created by a will, and the trustees were required to make provision out of the income thereof for the support of certain relatives of the testator so far as might be necessary for that purpose, and the balance of the income was to be paid his wife during her life and until she married. Provision was then made for the use of the income of the estate after the death of the wife, but it was held that the provisions of the trust in favor of the wife were not affected by the fact that the directions respecting the trust estate after her death were unlawful: *Ward v. Ward*, 105 N. Y. 68. The general rule applicable to our subject was thus restated in *Underwood v. Curtis*, 127 N. Y. 523, 541: "If the provision for the benefit of the widow and the two unmarried daughters during the life of the widow is inseparably connected with the other dispositions of the will and a necessary part of the general scheme for the disposal of the testator's property, then it must fail with them, and the testator die intestate. But where several trusts are created and those which render the entire disposition illegal can be separated, and the legal upheld without doing injustice or defeating that which the testator might be presumed to wish, that which is illegal or which added to others renders the whole illegal, may be cut off, and the intention of the testator given effect so far as the statute will per-

mit." The court found upon examination of the will in question that it was apparent that its primary purpose was to provide for the widow and unmarried daughters of the testator by giving them the use of the entire estate during the widow's life, and that therefore the fact that his will contained an invalid direction or disposition as to what should be done with the property or its income after the death of the widow did not prevent the court from giving effect to the testator's intention respecting the use of the property during her life. The circumstances of this case and the conclusions reached therein are substantially identical with the circumstances and conclusions of *Culross v. Gibbons*, 130 N. Y. 447. Numerous other cases might be cited all affirming that when a disposition is made of property to be used by designated persons during their lives or for their support during their lives, and the provisions made for the disposition of the property thereafter are invalid, that the court will presume that it was the primary object of the person making the attempted disposition of the property to provide for its beneficiaries during their lifetimes, and that this object was in no way connected in his mind with the subsequent disposition of the property, and hence that the invalidity of such disposition cannot affect the preceding and valid estates or interests: *Brown v. Richter*, 76 Hun, 469; 27 N. Y. Supp. 1094; *Mulry v. Mulry*, 89 Hun, 531; 35 N. Y. Supp. 618; *Finch v. Willis*, 17 Misc. Rep. 428; 41 N. Y. Supp. 227.

GERNERD v. GERNERD.

[185 PENNSYLVANIA STATE, 233.]

HUSBAND AND WIFE—ACTION BY HER FOR THE ALIENATION OF HIS AFFECTIONS.—Where a wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, she may maintain an action against one who has wrongfully induced her husband to leave her.

HUSBAND AND WIFE—ACTION BY WIFE AGAINST FATHER OF HER HUSBAND FOR ALIENATING HIS AFFECTIONS.—A father has the right to advise his son, and, if he acts with proper motives and in good faith in doing so, cannot be regarded as an intermeddler; but a father who, maliciously and with a view to separating his son and the latter's wife, aids, advises, and assists, and by promises or threats, procures his son to leave his wife, is liable to an action by her.

STATUTE OF LIMITATIONS IN ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS.—Though a husband is procured to desert his wife by words spoken of her by his father, her action for the injury thus sustained by her is not in form and substance an action of slander, and therefore is not barred by the statute of limitations applicable to actions for that offense.

Action by a wife to recover damages for wrongfully inducing her husband to separate from her. The defendant was the father of the plaintiff's husband. The evidence tended to prove

that the defendant, by constantly disparaging plaintiff and exhibiting an unfriendly manner toward her, and by threats, and perhaps by promises, induced the son to leave her. The defendant called the plaintiff offensive names, indicating that she was uncleanly, unfit to have been married by a decent person, incompetent to perform household duties, and that she was Irish and was also a glutton and a negro. The trial court refused to give any of the instructions asked for by the defendant, and on behalf of the plaintiff instructed the jury that: "A wife may maintain an action for the loss of the society, consortium, companionship, aid, and assistance of her husband, against one who wrongfully and maliciously, wickedly, and unjustly induces and procures, advises, aids, and assists her husband to abandon her or drive her away," and that if the jury find that the defendant "maliciously, wrongfully, wickedly, unlawfully contrived, with the express purpose the plaintiff and her said husband to separate in their domestic relations, and to deprive the said plaintiff of the care, society, aid, and companionship of her said husband, and did advise, aid, and assist, and by promises and threats, procure and cause the plaintiff's husband to become alienated in feeling and affection, and caused the said husband to leave plaintiff and refuse to live with her, then the plaintiff is entitled to recover." Verdict for plaintiff for two thousand five hundred dollars, of which five hundred dollars were afterward remitted. The defendant appealed.

R. E. Wright and Evan Holben, for the appellant.

Edward Harvey and E. J. Lichtenwalner, for the appellee.

²³⁶ FELL, J. The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore v. Greenbank*, Willes, 577, decided in 1745. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other, and the injury is the same whether it affects the husband

or the wife. Where the wife has been freed from her common-law disabilities and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett v. Bennett*, 116 N. Y. 584; *Foot v. Card*, 58 Conn. 4; 18 Am. St. Rep. 258; *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597; *Westlake v. Westlake*, 34 Ohio, 621; 32 Am. Rep. 397; *Haynes v. Nowlin*, 129 Ind. 581; 28 Am. St. Rep. 213; *Warren v. Warren*, 89 Mich. 123; *Bassett v. Bassett*, 20 Ill. App. 543; *Price v. Price*, 91 Iowa, 693; 51 Am. St. Rep. 360; *Clow v. Chapman*, 125 Mo. 101; 46 Am. St. Rep. 468; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13. The New York and Indiana cases cited overrule the ²³⁷ earlier cases in those states in which a different conclusion had been reached. The only decisions in which we find the right denied are *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, and *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499. Of late years, the right of the wife to sue has generally been maintained by text-writers. It is said in *Bigelow on Torts*, 153: "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." And in *Cooley on Torts*, 228, note: "We see no reason why such an action should not be supported, where by statute the wife is allowed for her own benefit to sue for personal wrongs suffered by her." In *Jaggard on Torts*, page 467, many of the cases on the subject are referred to, and the conclusion is thus stated: "On the other hand, it has been insisted that in natural justice no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be coextensive with the right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion." The same proposition is stated in 1 *American and English Encyclopedia of Law*, second edition, page 166, and in 1 *Bishop on Marriage, Divorce, and Separation*, section 1358.

The defendant in this action was the father of the plaintiff's husband, and the case was one to be carefully guarded at the trial. The intent with which he acted was material in determining his liability. It was his right to advise his son, and in so doing in good faith, and with a proper motive, he should not be regarded in the same light as a mere intermeddler. A clear case of want of justification on the part of the parents should

be shown before they should be held responsible: *Cooley on Torts*, 265; *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Huling v. Huling*, 32 Ill. App. 519; *Tasker v. Stanley*, 153 Mass. 148; *Fratini v. Caslini*, 44 Am. St. Rep. 850, note.

On the trial the plaintiff was held to distinct and clear proof that the defendant wrongfully and maliciously caused her husband to abandon her. Every right which the defendant could properly claim in this regard was carefully stated in a very clear and adequate charge.

The claim that the action was in effect an action for words spoken, and consequently barred by the statute of limitations ²³⁸ cannot be sustained. It was not, either in form or in substance, an action of slander, and the words proved were only one of the many means employed by the defendant to effect his purpose.

The judgment is affirmed.

HUSBAND AND WIFE—WIFE'S ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS.—It has been settled by the weight of authority that a wife may, without joining her husband, maintain an action to recover damages for the alienation of his affections, and the consequent loss of his society, assistance, and support, if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband: See monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 474; *Price v. Price*, 91 Iowa, 693; 51 Am. St. Rep. 360; *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597, and note. Compare *Smith v. Smith*, 98 Tenn. 101; 60 Am. St. Rep. 838, and note.

HUSBAND AND WIFE—ALIENATION OF HIS AFFECTIONS. Proof that a separation between husband and wife has been caused by the unwarranted interference of his relatives, accompanied by threats to disinherit him, is sufficient to enable a wife to maintain an action against, and recover from, such relatives for alienation of her husband's affection: *Price v. Price*, 91 Iowa, 693; 51 Am. St. Rep. 360. A parent may, in good faith and from worthy motives, in a moderate, temperate, and careful manner, advise his son as to his domestic affairs without incurring liability for alienating his affections, though his advice influences a separation between his son and the latter's wife; but such relation will not excuse gross injustice deliberately perpetrated against the rights of the wife: See monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 477.

HUSBAND AND WIFE—ALIENATION OF HIS AFFECTIONS—STATUTE OF LIMITATIONS.—An action by a wife for the alienation of her husband's affections is not governed by that section of the statute of limitations concerning direct physical injuries to the person, but is controlled by that section which limits the time in which an action may be brought for an injury to personal and relative rights: See monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 478.

WILLIAMS v. TOZER.

[185 PENNSYLVANIA STATE, 302.]

TRUSTS—JUDGMENT AGAINST TRUSTEE.—A trustee cannot, by giving a judgment bond in a matter in which the trust estate is not interested, create a liability against it, and, if judgment is entered on such bond, an injunction to prevent the sale of the trust property thereunder should be issued at the instance of one of the beneficiaries of the trust.

Application for an injunction against the sheriff to prevent his levying upon property belonging to the estate of Sarah Tozer, deceased. She, by her will, devised certain property to her husband in trust for her son, giving the trustee power to collect outstanding bills and accounts and use the proceeds, so far as necessary, to carry on a coal business in which the deceased was engaged at the time of her death, and the surplus, to hold and keep invested in paying securities. The trustee executed a judgment bond to secure a certain indebtedness due from a firm of which the son was a member. The injunction was granted, and from the order granting it an appeal was taken.

Rodney A. Mercur, for the appellant.

F. Overton and H. F. Maynard, for the appellees.

305 PER CURIAM. Notwithstanding the able and ingenious argument of appellant's counsel, we are not convinced that the learned court erred in making absolute the rule theretofore "granted so far as it enjoins the sheriff from selling any property of or belonging to the estate of Sarah Tozer, deceased." That estate—represented by Ralph Tozer, trustee, one of the parties to the bond on which the judgment was entered by virtue of the warrant of attorney contained therein—was neither interested in the transaction in which the judgment bond was given, nor received any benefit therefrom. As trustee or otherwise, Ralph Tozer had no authority, express or implied, to bind the estate or subject the property or assets thereof to execution in favor of the plaintiff. The authorities relied on by appellant are inapplicable to the facts of this case.

Decree affirmed and appeal dismissed at appellant's costs.

TRUSTS—UNAUTHORIZED ACTS OF TRUSTEE—RIGHTS OF BENEFICIARIES.—Trustees are not allowed to deal with the trust estate for their own benefit: *Miller v. Davidson*, 3 Gilm. 518; 44 Am. Dec. 715, and note; monographic note to *Nyce's Estate*, 40 Am. Dec. 516. Acts in relation to the trust property, not justified by implication, and in excess or variance of the powers ex-

pressly conferred upon him, are in contravention of his trust and are void: *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363. Such acts will not be held binding upon the trust or the beneficiaries, except in rare instances: See monographic note to *Day v. Brenton*, 63 Am. St. Rep. 467-477.

DU PLAINE'S ESTATE.

[185 PENNSYLVANIA STATE, 332.]

TRUSTS—COBENEFICIARIES—TRUST RELATIONS BETWEEN.—If a trust is created for the joint benefit of two persons, whereby it is the duty of the trustee to pay to each, during life, one-half of the income of the trust property, one of the beneficiaries cannot secure to himself any advantage over the other by reason of his superior or exclusive knowledge of a fact which both are interested to know. Hence, if one, finding the trustee in an embarrassed financial condition, procures him to settle and pay over one-half of such income, such payment cannot be held for his sole benefit, but he must account to his cobeneficiary, or to a new trustee, for all moneys or securities received as the result of such settlement.

Suit for the appointment of a new trustee and to compel the respondent, Benoni C. DuPlaine, to assign to such trustee certain bonds and mortgages.

B. F. Fisher, for the appellant.

William C. Hannis, for the appellee.

The opinion of the trial court was as follows:

"The petitioner and respondent are brother and sister. Their mother by her will gave all the rest, residue, and remainder of her estate to a trustee in trust to manage the same and collect and receive the rents, issues, and profits thereof, and 'pay in semi-annual installments one full one-half part of net rents, income, interest, dividends, and profits unto my son, Benoni C. DuPlaine, for and during all the term of his natural life,' et cetera. And the 'said trustee shall pay the remaining one-half part of the said net rents, interest, income, dividends, and profits in semi-annual installments unto my said daughter, Helen Augusta C. Childs, for and during the full term of her natural life,' et cetera. In the case of the death of either of the said life tenants, the principal was to go to their children, with, however, a power of disposition otherwise by will, and, in default of children or a will, then cross-remainders from one to the other. The brother had accidentally learned that the trustee was in an embarrassed condition financially, and went to him and in-

sisted upon a settlement for his one-half of the principal sum which was in his hands as trustee, and, under pressure of threatened arrest, et cetera, received from him a mortgage upon some real estate for exactly one-half of the trust estate. The brother for several years concealed all knowledge of the insolvent condition of the trustee from his sister, and also the fact that he had tried to protect himself by securing this mortgage. This he now claims he holds for his own benefit alone, and that his sister has no interest therein. Such are briefly stated the facts.

"It is hard to find language sufficiently strong to condemn the conduct of a brother who would thus try to secure himself and leave his sister in the lurch, and, after he supposed he was himself secure, not to give her the knowledge by which she might have been able to secure herself also; but the case is not to be decided upon any sentimental considerations, but upon the law as applicable to the facts as they are presented.

"It will be observed that the trust is a joint one, and although the trustee in an account filed divided the fund in half and stated that he held one-half for one and the other half for the other of the cestuis que trust, there was no distribution so decreed, and in fact there could not be any separation of this fund under the will of the testatrix until one or the other of the cestuis que trust died, when other interests might intervene. The mother gave all her residuary estate to this trustee to pay one-half of the income to the son and one-half of the income to the daughter. She did not give one-half of the principal to be held for each, but it all is to be held jointly in trust for both. In *Aubert's Appeal*, 119 Pa. St. 52, and in *Wilen's Appeal*, 105 Pa. St. 121, the supreme court laid down the law that where an estate is so given for two persons it is to remain intact until the time for distribution arrives, because: 'We cannot say,' to use their language, 'that a moiety of the income of the whole may not be more valuable to the surviving life tenant than the whole of the income of the moiety.' The time for the distribution of this fund has not arrived and, therefore, there can be no distribution or division of it, and in case of a devastavit, as has here happened, anything that the vigilance of either of the cestuis que trust or anyone else has rescued from the wreck must inure to the benefit of both of them. It has been settled that where there is a community of interest there is a community of duty; each of those interested must be faithful to himself and equally as well to all the others interested. He can secure no advantage over the others, because he has found out something

they do not know, or because, perhaps, he is in a better position to protect himself than are they. The rule of law stated in *Keech v. Sanford*, 1 Lead. Cas. Eq., 4th Am. ed., 64, has been followed in numerous cases in this state: 'Whenever one person is placed in such relations to another by the act or consent of that other, or by the act of a third person, or by the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.' This doctrine was enforced in *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696, the syllabus of which is as follows: 'When several persons have a joint or common interest in an estate, one cannot purchase an encumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests.' Chief Justice Lewis, in delivering the opinion, said: 'Community of interest produces community of duty. . . . A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. . . . Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an encumbrance or outstanding title, and set it up against the rest, for the purpose of depriving them of their interests. Chancellor Kent, with great truth, remarked that such a proceeding would be repugnant to a sense of refined and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties created. It is the duty of all to deal candidly and benevolently with each other and to cause no harm to their joint interests.' To the same purpose, see *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Gibson v. Winslow*, 46 Pa. St. 380; 84 Am. Dec. 552; *Kennedy v. Borie*, 166 Pa. St. 360; *McCutcheon v. Smith*, 173 Pa. St. 101; *Powell v. Lantzy*, 173 Pa. St. 543.

"The fact, which was so urgently pressed at the argument that it was not proved that any portion of these trust funds went into the particular property upon which the mortgage was given can make no difference. Whether they did or did not is immaterial. The only claim the respondent had upon the trustee was as a cestui que trust under this will. He was not a creditor in any other way. When this mortgage was given to him the consideration passing was that the trustee owed this trust

estate money. Therefore, anything that he received upon that account must in law, equity, morals, and common decency be held by him in trust for his sister as well as himself.

"The petition in this case is granted."

The respondent appealed, and the supreme court adopted the opinion of the trial court, saying:

³³⁷ PER CURIAM. There is no substantial error in the findings of fact in this case, and on the facts thus established the decree complained of is free from error. The questions involved were well considered and correctly decided by the orphans' court; and on its opinion the decree is affirmed and appeal dismissed at appellant's costs.

TRUSTS—FIDUCIARY RELATIONS BETWEEN PERSONS HAVING A COMMON INTEREST.—The holding of the principal case is merely an application of the general rule that where two persons have a community of interest, there is also a community of duty between them: Extended note to *Venable v. Beauchamp*, 28 Am. Dec. 84. Thus, joint tenants and coparceners stand in confidential relations in regard to one another's interest. Neither is permitted in equity to acquire an interest in the property hostile to that of the other: *Roberts v. Thorn*, 25 Tex. 728; 78 Am. Dec. 552; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note; extended note to *Venable v. Beauchamp*, 28 Am. Dec. 83-86, where the reasons for the rule and the extent of its application are discussed.

RUDY'S ESTATE.

[185 PENNSYLVANIA STATE, 359.]

ESTATES OR GIFTS—WHEN CONTINGENT.—Where the persons who are to take a gift must be living at a certain time, the gift is contingent. Hence, if executors are directed to hold an estate until the death of the testator's wife, and then to sell it and divide the proceeds between his two children, if they be living, or the issue of such of them as may be deceased, a child of the testator dying before his or her mother never had any interest in the estate.

A POWER OF SALE CANNOT BE EXERCISED AFTER THE NECESSITY FOR IT HAS CEASED.—Therefore, if a testator authorizes his executors, at the death of his widow, to sell his property and divide it among his children, but, at the time of his wife's death, none of the children survive, the power is extinguished, because there is no longer any necessity to sell to effect the testator's purpose to divide the property among his children.

CONVERSION OF REALTY INTO PERSONALTY.—A power of sale given to executors to enable them to divide the property among testator's children does not convert real into personal property, unless his will shows his intention, not only to convert real estate into personal for the purposes of the will, but also to give the product of the sale as personalty at all events and whether

the purpose takes effect or not. Where the purposes of a conversion have utterly failed, the property will devolve according to its original character.

Petition by the husband of Sarah K. Hudson, whose maiden name was Rudy, for the sale of certain real estate. By the law of Pennsylvania, real property, on the death of a person leaving a widow and father, but no children, descends to the heirs at law of the decedent, subject to a life estate in favor of the father and widow, each being entitled to an undivided one-half of such property for life: *Pepper and Lewis' Digest*, secs. 1, 5, pp. 2408, 2410.

Allen H. Gangewer, George D. Hay, and Gilbert & Atkinson, for the appellant.

J. Percy Keating and B. Gordon Bromley, for the appellee.

The opinion of the trial court was as follows:

"The testator gave to his wife the income for life of his residuary estate, and at her death he authorized and empowered his executors to sell the residuary realty and to divide the proceeds of its sale equally between his two children, Sarah K. and George W. Rudy, 'if they be living, or the issue of such of them as may then be deceased.' He died in 1878. George W. died in testator's lifetime, unmarried and without issue. The widow died November 30, 1895. Sarah K. died before the widow, but after the testator, leaving her husband and two sons to survive her. One of the sons died during the life tenancy, leaving a widow. The husband of Sarah petitioned for an order of sale of the realty and a division of the proceeds. Had he an interest in the estate? And if he had, was it an interest which qualified him to ask for the sale? This question involves the preliminary inquiry as to the character of the estates given to the children. Were they vested or contingent interests? The word 'if,' in the language of the gift 'if they be living,' undoubtedly imports a contingency; yet the context may show that the contingency was not a condition precedent to the vesting, but a condition subsequent which would operate merely to defeat an already vested estate. Thus, in *Andrew v. Andrew*, L. R. 1 Ch. Div. 410, A. devised land to T. for life, and from and after his death to his oldest son, if he should have attained the age of twenty-one, and in default of T.'s having a son, then over. T. died, leaving one son, a minor. It was held that 'from and after' meant an immediate gift at the death of the life tenant, and that the son took a vested estate in fee, subject to be divested

by his death while a minor. In *Alexander v. Alexander*, 16 Com. B. 59, however, where the gift was to A., the son, for life, and from and after his decease to A.'s second son, on his attaining twenty-one, and in default of there being a second son, then over, the decision was that the remainder to A.'s second son, who died in his minority, was contingent. In Pennsylvania the rule is well established that where the persons who are to take must be living at a certain time, the gift is contingent, because, until the time arrives, the persons who will answer to that description cannot be ascertained. Hence a gift to 'such of his children as might then be living' (*McBride v. Smyth*, 54 Pa. St. 245), or to a child for life, and after her death to 'all her children then living' (*Buzby's Appeal*, 61 Pa. St. 111; *Delbert's Appeal*, 83 Pa. St. 462), has been esteemed contingent. It is difficult—perhaps it is better to say impossible—to harmonize the latter cases with *Crawford v. Ford*, 7 Week. Not. Cas. 532, and *Laguerenne's Estate*, 12 Week. Not. Cas. 110, where the gift at the end of the life estate was to 'all my children who shall be then living, and the lawful issue of such as shall be dead'; or *Manderson v. Lukens*, 23 Pa. St. 31, 62 Am. Dec. 312, to 'be equally divided among his children which should be then alive'; and *Womrath v. McCormick*, 51 Pa. St. 507, where the estate was to 'be divided into as many parts as testator should then have children living, and be given to his living children and the issue of those dead,' in all of which cases the estates were held to be vested. In this instance the scale vibrates about evenly.

"If, by the phrase 'if they be living,' a qualification is annexed to the person, without fulfilling which he will be ineligible to take, the gift is uncertain until the condition is met, and is necessarily contingent upon the fact of his living. If, however, it is used to mark the time when the estate shall vest in possession, so that the children are to take an estate descendible to their issue, which is to be enjoyed by the children at the death of the life tenant or by the heirs of their body, if they shall be dead, it carries a vested interest. This was the doctrine of *Richardson's Appeal*, 19 Week. Not. Cas. 175, where the gift was after the wife's death, to the children by name, 'and if any of my said children be deceased,' the share shall go to his issue. The assumption that the interests were vested is favorable to the petitioner. If they were contingent upon the survival of the life tenant, the only party who by possibility would take was the surviving grandchild. The scheme of the will was to work a conversion.

"The stock and fixtures in trade of the testator were ordered to be sold, and their proceeds, together with the proceeds of sale of two specified houses, were directed to be applied to the payment of his debts, and, finally, the moneys from the sale of the remaining real estate were to be divided among his children. The lapsed share of George, if it was personalty, vested as to one-third in testator's widow and as to the balance in Sarah as testator's next of kin, and at her death in her two sons. When one of them died, the widow of the son was entitled to one-half and the father to one-half absolutely. But the intention to effect a sale was auxiliary to another and paramount intention—to effect a convenient transmission of testator's property to the devisees. The one intent affected the means, and the other the end, and if, for any reason, the means were useless toward attaining the end, the lesser intent should be discarded. The purpose of a sale, and therefore of a conversion, was that the estate might be divided; if there was no necessity for a division, the purpose fell and the estate remained unconverted.

"In the famous argument of Mr. Scott, afterward Lord Eldon, which was adopted by the chancellor in *Ackroyd v. Smithson*, 1 Brown Ch. 503, it was shown that, in order to oust the heir, there must be not only an intention to convert the real estate for the purposes of the will, but also to give the product of the sale as personalty at all events and whether the purpose takes effect or not. In that case, the testator ordered his real and personal estate to be sold, and he gave the net proceeds to legatees, two of whom died in his lifetime. The lapsed shares, so far as they consisted of personalty, went to the next of kin, and, so far as they were constituted of realty, went to the heirs at law. This doctrine that real estate directed to be converted in order to subserve a purpose will be treated as personalty for that purpose, but will remain unchanged as to all beyond what that purpose requires, was upheld in *King v. King*, 13 R. I. 501, and *Craig v. Leslie*, 3 Wheat. 581, and those cases were followed by this court in *Worsley's Estate*, 36 Week. Not. Cas. 247.

"Where the purposes of the conversion have totally failed the property will devolve according to its original character: *Bispham's Equity*, sec. 315. This retention of the quality of an estate, which the testator intended to transmute into another and different quality, may work a radical change in the interests of his beneficiaries. But that consideration can have no weight when we reflect that what has happened was outside of his contemplation altogether. He supposed that more than one person

would share the residue, or he would not have ordered the sale and division of that residue. How can we, with any show of propriety, speculate upon what, if he had foreseen the actual event, he would or would not have done, either by way of preferring the heir, on the one hand, or the next of kin, on the other? The share which is in controversy lapsed by operation of law. Its disposition cannot be referred to the intention of the testator, because he had no intention with regard to it. It must be determined by the law, to which his silence on the point has relegated it.

"The case, then, is simply this: At the death of George W. Rudy, his share vested in Sarah K. Rudy as sole heir of the testator, but, inasmuch as her estate did not vest in possession, living the life tenant, her husband could not, at her death, take as tenant by the curtesy. Her two sons succeeded to her estate, and on the death of one of them, the survivor, subject to the life interests of the widow and father, took the lapsed share as heir, and the residue as sole devisee. The fee, therefore, centered in him as the one owner, and the direction to divide fell, because it is impossible to sever what is indivisible. The petitioner, as life tenant in one-fourth of the realty, has certainly not such an interest as will entitle him to a sale."

An appeal having been taken from the judgment of the trial court, its opinion was accepted by the appellate court, that court saying:

366 PER CURIAM. We find no error in the decree from which this appeal was taken. The questions involved were fully considered and correctly disposed of by the court below; and for reasons given in its opinion the decree is affirmed and appeal dismissed at appellant's costs.

ESTATES—WHEN CONTINGENT.—An estate is said to be vested in interest when there is a present fixed right in some one to the future enjoyment of it; it is not vested, but contingent, when either the person who is to enjoy it, or the event upon which the estate is to arise, is uncertain: *Johnston's Estate*, 185 Pa. St. 179; ante, p. 621. and note. Where a will provides that upon the death or remarriage of the widow of the testator, the executors shall proceed to divide his estate among his children, or such of them "as may be then alive, or the lawful issue of such of them as may be dead leaving lawful issue," each child, or if dead, his issue, takes only a contingent remainder dependent upon the termination of the particular estate, and upon his or their being alive: *Haward v. Peavey*, 128 Ill. 430; 15 Am. St. Rep. 120, and note.

POWERS OF SALE—TERMINATION OF.—A power of sale contained in a will, though expressed in the most general terms as to the time of its exercise, cannot be further exercised if the purpose

for its creation appears, and that purpose has ceased: *Wilkinson v. Buist*, 124 Pa. St. 253; 10 Am. St. Rep. 580. A power to sell for special purposes can be exercised for those purposes alone: *Floyd v. Johnson*, 2 Litt. 109; 13 Am. Dec. 255.

WILLS—DOCTRINE OF EQUITABLE CONVERSION—WHEN APPLIED.—Equitable conversion does not occur unless there is an imperative direction in the will that land shall be converted into money or money into land: *Ducker v. Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135, and note. A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but such power, coupled with a direction or command to sell, will have that effect: *Fahnestock v. Fahnestock*, 152 Pa. St. 56; 34 Am. St. Rep. 623, and note; extended note to *Ford v. Ford*, 5 Am. St. Rep. 141-147.

PREVOST v. CITIZENS' ICE AND REFRIGERATING Co.

[185 PENNSYLVANIA STATE, 617.]

MASTER AND SERVANT.—A VICE-PRINCIPAL, FOR WHOSE NEGLIGENCE AN EMPLOYER IS LIABLE TO OTHER EMPLOYEES, MUST BE EITHER one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work, but control of the business, and exercising no discretion or oversight over him, or one to whom he has delegated a duty of his own, which is a direct, personal, and absolute obligation from which nothing but performance can relieve him.

MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS NOT.—An engineer in charge of an engine in an ice factory, who is directed by his superior to do certain work necessary to the removal of ice from the pipes, and who, in turn, gives directions to another employé for the doing of such work, is not a vice-principal, but a fellow-servant with the latter, and hence their common employer is not liable for the negligence of such engineer in giving directions, though they lead to the injury of the other employé.

MASTER AND SERVANT—VICE-PRINCIPAL DISOBEYING ORDERS—LIABILITY OF THE MASTER FOR.—If a master gives an express order not only what to do, but how to do it, even a vice-principal is bound to obey, and becomes, for the time, a mere coemployé, and the master is not answerable to another employé for injury received through such vice-principal's directing the work to be done in a manner different from that directed by the master. He is not bound to personally supervise the doing of the work, but is entitled to assume that his orders will be carried out.

Action to recover for personal injuries received by the plaintiff while in the employ of the defendant corporation. It had a corps of officers employed in supervising its works, including a president, a general manager, and a secretary. An engineer named Flynn was in charge of the engine. It became desirable to remove the ice from certain pipes in the storage-room, and, to accomplish this purpose, Flynn was by the president of the company directed to shut down the brine pump for two or three

hours, by which time, as the cold would be diminished, the ice would soften, after which Flynn was directed to have some one go along the pipes with an ice pick and remove the ice accumulated thereon. The engineer disobeyed his orders. He did not shut down the brine pumps at all, but directed an employé to take an ax and break off the ice. This employé took an ax, struck the pipes a hard blow with it, and they, with their heavy coating of ice, thereupon fell upon and injured the plaintiff, who was then engaged on the premises as an extra man to do such work as might be, from time to time, required of him. The trial court instructed the jury that the plaintiff could not recover if his injury was the fault of his fellow workman, Corner, who struck the pipes, unless Corner acted by direction of some officer of the company higher in authority; that it was the duty of the jury to inquire by whose orders the pipes were hit with the ax and that mode of cleaning adopted, and that if the method was adopted by the company and it sent Corner to clean the pipes in that way, then the plaintiff might recover. Verdict and judgment for the plaintiff; the defendant appealed.

J. Howard Gendell, for the appellant.

William Drayton, for the appellee.

621 MITCHELL, J. A vice-principal for whose negligence an employer will be liable to other employés must be either: 1. One in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintendent certain work or certain workmen but control of the business, and exercising no discretion or oversight of his own: *New York etc. R. R. Co. v. Bell*, 112 Pa. St. 400; or 2. One to whom he delegates a duty of his own which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160; *Prescott v. Ball Engine Co.*, 176 Pa. St. 459; 53 Am. St. Rep. 683.

In the present case, the uniform testimony was that the fall of the pipes that injured the plaintiff was caused by the manner of removing the ice from them, and the judge submitted to the jury to find whether the manner was adopted by the workman who did it, on his own judgment, or whether he did it "by direction of some of the officers of the company higher in authority." The only person to whom the evidence pointed as having given the order was Flynn, and he does not come within

either branch of the definition of a vice-principal. The evidence is practically undisputed that the president of the company visited the factory several times a week and exercised a general supervision over its operation. Next to him in authority was Harper, the general manager who hired the men, including plaintiff, and "had entire charge of the business inside and out," as one of plaintiff's witnesses expressed it. Flynn was the chief engineer, and had general charge of the engine-room and the freezing department, of which he was the foreman or ⁶²² boss. In that capacity he gave orders to the men in that department, and as the manager, Harper, testifies, had authority to engage men for short jobs in the manager's absence. This is the whole substance of the testimony, and it does not in any view amount to more than that Flynn was the foreman of that room or department. A foreman is ordinarily a fellow workman: *McGinley v. Levering*, 152 Pa. St. 366.

So far we have considered only the plaintiff's evidence. If, however, we look at the defendant's, we find that Ballingall, the president, gave the order to Flynn, not only to have the ice removed from the pipes, but to do it by shutting down the brine pumps and letting the pipes become sufficiently warm to allow the ice to be removed easily. If Flynn disregarded this order and directed it to be done in a different way, the defendant would not be liable in any event. Where the employer himself assumes control and gives an express order not only what to do but how to do it, even a vice-principal is bound to obey, and becomes for the time being a mere coemployé, whatever his general authority under other circumstances. And the employer is not bound to personally supervise the doing of the work. He is entitled to assume that his orders will be carried out.

The evidence, therefore, whether we look at that on the part of the plaintiff, or at the whole, fails to show anything that justifies the submission to the jury of the question whether Corner, the workman who caused the accident, was acting under the orders of the defendant company or any of its officers, and as Corner himself was admittedly a coemployé, the verdict should have been directed for the defendant.

Judgment reversed.

MASTER AND SERVANT—VICE-PRINCIPAL—WHO IS.—A servant, agent, or employé, while performing a duty required of the master, stands in the place of the master, and becomes a vice-principal: *Newbury v. Getchel Mfg. Co.*, 100 Iowa, 441; 62 Am. St. Rep. 582, and note. Where a master delegates to one of his employés such authority as subjects the will and discretion of all

other employés in and about a particular business to the direction and control of the person to whom that authority is delegated, he will be said to be a vice-principal, and to stand in the relation of the master himself. His negligence may, therefore, be imputed to the master: *Taylor v. Georgia Marble Co.*, 99 Ga. 512; 59 Am. St. Rep. 238, and note; *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535; 49 Am. St. Rep. 356, and note. A vice-principal retains his character as such only so long as he acts in discharge of the duties which the principal owes to his employés. Beyond this he acts only as a workman, and not as a vice-principal: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160; beyond this he is merely a fellow-servant: Note to *Ross v. Walker*, 23 Am. St. Rep. 165.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

GREENVILLE v. ORMAND.

[51 SOUTH CAROLINA, 58.]

NEGOTIABLE INSTRUMENTS—EVIDENCE.—In an action on a note by the holder against the principal and sureties, conversations between the indorser and the payee, made in the presence of the payer as to the negotiation of the note, are admissible in evidence, although the sureties were absent at the time the conversation was had.

EVIDENCE.—**ACCOUNT-BOOKS IF IN EXISTENCE**, are the best evidence of their contents, and a witness cannot state the condition of such accounts from memory while such books are accessible.

NEGOTIABLE INSTRUMENTS—EVIDENCE.—In an action on a note by a holder for value, a conversation between the makers thereof at the time of execution is not admissible in evidence, unless communicated to the holder before purchase by him.

PRACTICE.—**IT IS IMMATERIAL ERROR** to rule out evidence offered by defendant to prove a fact already admitted by the plaintiff.

NEGOTIABLE INSTRUMENTS.—ACCOMMODATION INDORSERS may withdraw their names from a note at any time before it is actually negotiated.

NEGOTIABLE INSTRUMENTS—RELEASE OF SURETIES. The holder of a note for value, with notice of its execution by sureties to enable the payee to discount it, and that the latter indorsed it without consideration, cannot enforce it against the sureties.

APPELLATE PRACTICE—JUDGMENT IN EXCESS OF VERDICT.—An objection that the amount of the judgment is in excess of the verdict cannot be raised for the first time on appeal.

Hart & Hart, Finley & Brice, and C. E. Spencer, for the appellants.

J. A. McCullough and Wilson & Wilson, for the appellees.

65 POPE, J. The above-entitled action came on for trial before his honor, Judge Watts, and a jury, at the November,

1896, term of the court of common pleas for York county, in this state. After a verdict in favor of the plaintiff and the entry of a judgment thereon all the defendants, except G. C. Ormand, as survivor of Ormand & Goforth, appealed therefrom. In order that the grounds of appeal may be understood, it seems to me that some reference to the pleadings, the testimony, and the charge of the circuit judge will become necessary. The complaint of plaintiff alleged that the defendants were indebted to it by reason of two promissory notes, executed in 1892, in the aggregate sum of four thousand dollars, and interest thereon, at the rate of eight per cent per annum, from the tenth day of May, 1892, until paid, and costs. The answer admitted the execution of the two notes in question, but denied any liability to pay said notes: 1. Because they deny that plaintiff is the lawful owner and holder of said two several notes, or either of them, by indorsement, transfer, or otherwise. They allege that neither W. E. Beattie, cashier, nor the National Bank of Greenville, acquired any title to the said notes, or either of them, and that plaintiff had notice of want of title at the time of said alleged transfers, if any were made, and that plaintiff paid no consideration therefor. 2. Because they allege that W. L. Goforth and G. C. Ormand were the principal makers and payers of said two notes, respectively, and that R. J. Dunlap and the defendants, L. K. Armstrong and L. R. Williams, were, and are, sureties thereto; and that plaintiff and W. E. Beattie, cashier, knew the relations of the several parties signing the two said notes. 3. Because they allege that the said R. J. Dunlap, now deceased, and the defendants, L. R. ⁶⁶ Williams and L. K. Armstrong, as sureties, signed the two several notes, payable to W. E. Beattie, cashier, for the purpose of enabling the principal makers, Ormand & Goforth, to borrow money from W. E. Beattie, cashier of the National Bank of Greenville, for the purpose of completing in a speedy and economical manner the sewerage work undertaken for said plaintiff, then well advanced, and for the completion of which the said sureties had undertaken by their bond. And it was not the purpose of said sureties, or either of them, in making said notes, to permit the same to be negotiated to any other person or corporation, or for any other purpose than as herein set forth. And these defendants allege that the plaintiff, without authority from these defendants, took possession of said two notes without advancing to the principal makers the cash for the same, and gave said Ormand & Goforth credit on account for the

value of said notes; and these defendants are informed and believe that the said two notes were misapplied by plaintiff to a previously existing indebtedness by Ormand & Goforth to said city council (the plaintiff), for which these defendants were in no wise liable, and of which they were then ignorant, and to other purposes not contemplated by said contract of suretyship. 4. Because the defendants deny that they, or either of them, are indebted to plaintiff in any sum whatever upon said notes, or either of them, and because the plaintiff is, largely in excess of the said two notes and interest on the same, indebted to the said Ormand & Goforth by reason of work and labor done under their contract with the plaintiff in the construction of the sewerage system. I do not quote more from the answer on this fourth defense, so far as the indebtedness of the plaintiff to Ormand & Goforth for work done in the construction of the sewerage system is concerned, for the reason that this element seems to have been, in some way, eliminated from the action at the trial thereof.

The testimony is not voluminous. The following is a copy of one of the notes in question—the two were practically ⁶⁷ identical:

“\$2,000.

Greenville, S. C., May 7, 1892.

“On demand after date, we, or either of us, promise to pay to W. E. Beattie, cashier, or order, negotiable and payable at the National Bank of Greenville, S. C., without offset, the sum of \$2,000, for value received. Interest after maturity at the rate of eight per cent per annum until paid.

“(Signed)

ORMAND & GOFORTH.

“R. J. DUNLAP,

“L. R. WILLIAMS,

“L. K. ARMSTRONG.”

Indorsements: “Without recourse on this bank. Hamlin Beattie, President. Without recourse. W. E. Beattie, Cashier.”

F. J. Bostick, a witness for the plaintiff, testified in substance as follows: As clerk and treasurer of the city of Greenville, I was present in my office during the morning of the 11th of May, 1892. There were present several members of the city council, also the sewerage contractors, Ormand & Goforth. I am not positive both of said contractors were present—I am certain one of them was present—I think Mr. Ormand was. The two notes now in question were in the hands of members of the city council when I entered my office. The mayor

and myself were instructed to indorse these notes. We did so, and I was then instructed to carry the two notes over to the Greenville National Bank, and tender them to the bank officials. Mr. Ormand went with me. When we tendered the notes at the bank, Mr. Beattie, as its president, said: "The city council is now in funds, and let the city lend the money on these notes to Messrs Ormand & Goforth." Mr. Beattie then said that there was no need for the mayor and clerk and treasurer to indorse these notes. And he then, and also the cashier, wrote the words on each note which appear on the same above their official signatures. "I then took the notes back to my office, and the mayor then erased his name and I erased mine. The city council then ordered me to pay Ormand & Goforth two thousand five hundred dollars at that time and fifteen hundred dollars afterwards. In all I paid Ormand & Goforth four thousand dollars. This money has never been paid back to the city council of Greenville. Mr. Ormand was present all the time." On his cross-examination he explained that the money was ⁶⁸ paid by his checks on the Greenville National Bank. The check was produced and identified by the witness as having been obtained from the Greenville National Bank. This witness also testified that when the bank officers put their indorsement on the two notes, nothing was paid to them, and that the witness knew that the bank had not advanced any money on these two notes. He also testified that he knew that Mr. Williams, Mr. Dunlap, and Mr. Armstrong were sureties on the two notes. G. C. Ormand was sworn as a witness for the defense. He testified that he was a member and survivor of the firm of Ormand & Goforth; that said firm had contracted to construct, and did construct the sewerage system for the city of Greenville; that said firm began work about the 28th of March, 1892; that his partner, Goforth, died the 31st of July, 1892. He also testified that he arranged with Dunlap, Armstrong, and Williams to sign the two notes. It was offered to read depositions made by Hamlin and W. E. Beattie, and also that of Lawson E. Armstrong. The court declined to allow the same read on the ground of irrelevancy. Such testimony appears copied in the "case."

As the requests to charge appear in the grounds of appeal, it will be well to report the charge of the presiding judge and the grounds of appeal. We will now consider the grounds of appeal. The first imputes error to the circuit judge in allowing the witness, F. J. Bostick, to testify as to what occurred

when the witness and G. C. Ormand went with the notes to the National Bank of Greenville, to attempt their negotiation with said bank, when its cashier, W. E. Beattie, was named as the payee therein, and when the defendant sureties were not present. It is certainly true that all the makers of these two notes placed the notes in the hands of G. C. Ormand as their agent, to negotiate the same with the National Bank of Greenville. The defendants so admit in their answer, and such facts, except as to Ormand's agency, appear in the notes themselves. Why was it not competent for this witness, who was present as an interested person, to ⁶⁹ detail what occurred then in connection with the attempt at the negotiation of these notes? In fact, the admissions of this witness as to what occurred then is made the basis of the principal defense by the defendants. The testimony was relevant to the issues raised by the pleadings themselves; but, apart from the pleadings, where notes, such as the present, are in issue, any testimony in the line marked out by the terms of the notes is competent.

As to the second exception, relating to the competency of certain testimony offered by the witness, Ormand, the judge was clearly right here. Ormand testified that books were kept by his firm, which showed the condition of the account of said firm with the city council of Greenville at all times, and that his knowledge was derived from such books, but that he was unable to state from his memory the condition of and detail of such account; also, it did not appear that such books were not in existence. Such books were the best and proper evidence as to these matters. It was not error to deny this witness any right to speak of this account from memory.

As to the third exception. The witnesses, Ormand, Armstrong, and Williams, could not testify as to conversations of the makers of these notes at the time they were signed, unless it was first proved that the plaintiff, or some one or more of its agents, were told of these conversations between the makers. There was no effort to prove any such knowledge on the part of the city council or its agents.

The fourth exception relates to the depositions of Hamlin Beattie and W. E. Beattie, relating to no consideration passing, when they, as officers of the bank, wrote their indorsements without recourse upon the two notes. The defendants had the right to this testimony, but it was immaterial error, because the plaintiff, through its witness, F. J. Bostick, fully

admitted that nothing was paid to the bank at the time these indorsements were made by its officers.

⁷⁰ Fifth exception relates to the admission of the deposition of Williams, one of the sureties to the two notes. The circuit judge committed no error in refusing to allow this deposition to be read in testimony; it related to the conversation alleged to have occurred between the makers when they signed the two notes, and no notice of such conversation was brought home to the city council, or its agents.

We come now to the alleged errors of the circuit judge in his charge, and refusals to charge. It is settled law that the charge of the judge must be restricted to the issues raised by the pleadings and the testimony in the cause. That portion of the constitution of the state which requires that "judges shall declare the law," means that circuit judges shall declare the law involved, or necessary, in causes then on trial, and not that judges shall declare the whole of the law, embracing all cases, civil and criminal. What were the issues tendered by the pleadings and raised at the trial? 1. That the plaintiff could not hold the defendants to any liability on the two notes sued on, because the notes were on their face made negotiable by the National Bank of Greenville, but were not so negotiated; 2. Because the indorsement by the president and cashier of the Greenville National Bank, being without value, was a nullity, and did not, and could not, carry title to the notes to the city council of Greenville; 3. Because, even if such indorsement of said bank was valid, the city council were not holders for value, by reason of the fact that there was no value paid by the plaintiff for such notes; 4. Because the city council could not be holders for value as against the sureties by reason of the fact they took said notes with full notice of the conditions expressed on the face of said notes; 5. Because the city council of Greenville could not be the legal holders of said notes, because of a condition made by the makers of the notes at the time they signed the same, although not expressed on the face of the notes. 6. Because the city ⁷¹ council had notice of the fact that the defendants, except Goforth, were sureties only, and, therefore, it was incompetent for Ormand & Goforth to vary the terms of said notes without the approval of said sureties, and, having done so, the city council of Greenville, as against said sureties, had no right to the position of holders of these notes.

I confess, at the outset, that this action, or rather the ap-

peal therefrom, has occasioned me profound concern, for, on the one hand, the rights of holders of negotiable notes for full value are concerned, and, on the other hand, the rights of indorsers, who claim that their contract should be restricted by the terms actually employed by them in the notes, which represent their contract, are involved; and if I fail to mete out the law merchant in this cause, it is not by reason of the want of careful, protracted and patient reflection on my part. The cases of *Fowler v. Allen*, 32 S. C. 229, and *Sullivan v. Williams*, 43 S. C. 489, establish the doctrine in this state that when the makers, including sureties, intrust a negotiable note to one of the makers to carry out the terms of the contract, he is made the agent of such makers. Now, I wish to be understood correctly just here. I do not mean that any general agency is thus created—that such an agent can do anything and everything; but such agent can do everything within the contemplation of the contract as expressed therein. Now, it is admitted on all hands that the firm of Ormand & Goforth were intrusted with these notes after the parties had signed the same. What was the admitted purpose of these notes? The defendants in their answer say it was “for the purpose of enabling the principal makers, Ormand & Goforth, to borrow money from W. E. Beattie, cashier of the National Bank of Greenville, for the purpose of completing, in a speedy and economical manner, the sewerage work undertaken for said plaintiff, then well advanced, and *for the completion of which the said sureties had undertaken by their bond*” (italics mine). The contract for the sewerage work was begun about April, 1892, and completed in September, ⁷² 1892. It is not claimed that there was any diversion of any of these funds arising from the negotiation of these two notes. It is true, in this connection, that the defendant sureties, in their answer, did claim that the notes did not yield to Ormand & Goforth any money, but that the same was given as a credit on Ormand & Goforth’s account with the city council of Greenville on the sewerage contract; but the testimony was absolutely convincing in the cause that four thousand dollars was paid in cash by the city council of Greenville to Ormand & Goforth on these two notes. So, in the charge of the judge, there was no request from defendants in reference to the fact that money was not paid by the city council of Greenville to Ormand & Goforth on these two notes. Thus they left it as a fact to be determined by the jury whether the city council paid value for the notes, and by

the verdict of the jury it was established that the city council did pay value for the notes. And it will appear, by reference to the requests to charge, that the defendant sureties made their battle on the ground that they alone contracted in their notes for the same to be negotiated at the Greenville National Bank and by no other person or corporation. We have already seen that there was no material diversion of the funds, which it was agreed between the makers should be realized by the negotiation of their notes, and that the four thousand dollars named in the two notes was actually paid to Ormand & Goforth by the city council. It remains, then, to determine if the surety defendants are released by the fact that the officers of the bank at Greenville did not actually pay any money or receive any money. To test this matter practically, what would have been the result if the city council of Greenville had paid the four thousand dollars without the notes ever having been carried to the National Bank of Greenville? I think, under the authority of *Pease v. Dwight*, 6 How. 190, the city council of Greenville could maintain this action. Under that decision it was held that the statute of 3 & 4 Anne, chapter 9, would be answered in the case of a note reciting in its body ⁷³ that "Walter Chester and Pease, Chester & Co., or order," were the payees, if only Pease, Chester & Co., with which firm Walter Chester was in nowise connected, indorsed said note, and Walter Chester refused to indorse said note. The principle affirmed was, that the plaintiff, Dwight, who had paid full value for the note, upon the indorsement of it over by the payees, to wit, Pease, Chester & Co. could maintain an action on it. This decision was made to answer the old requirements as to ownership of commercial paper payable to "order" which requirements were very strict in the matter of the indorsement of such paper to enable one as indorser to maintain his action. But now, under the changes wrought by our Code of Procedure, it is not necessary that a holder for value of such paper should have the same indorsed to him; for if he is the legal owner and holder of such note, he not only may sue, but he alone can sue, except in cases of certain trusts. It seems to me that when the indorsement in blank without recourse appeared upon these two notes by the said National Bank of Greenville, although they neither received nor paid a dollar therefor, that it did not interfere with the rights of the surety makers of the note. If the bank had discounted the paper in due course of business, it was in the power of the bank the next minute

to transfer such paper to anyone else. So that their indorsement in blank, without actually discounting the paper itself, enabled a third party, the city council of Greenville, to pay every dollar to the makers, Ormand & Goforth, and thereby become the lawful owners and holders of said paper. Now, I admit that the city council of Greenville could not have acquired those notes except by the payment of the four thousand dollars, as contemplated by the makers. In others words, they could not have taken that paper and applied it to the payment of any balance due to them by Ormand & Goforth, under their contract to construct a sewerage system for the city. It seems to me that the case of *Powell v. Waters*, 17 Johns. 176, where A made a note payable to B, or order, which was indorsed by B, for the ⁷⁴ purpose of being discounted at a bank for the accommodation of A, who, on being refused at the bank, negotiated it to a third person with a full knowledge of the circumstances, and the holder was allowed to recover, is fully up to the point involved in this case. I am inclined to hold that the use of the name of the cashier of the bank, as payee, and, also, the making of the note negotiable at such bank, merely put it in the power of these sureties to prevent any diversion of such notes to any other purpose than raising the four thousand dollars. This was effected in the case of *Dogan v. DuBois*, 2 Rich. Eq. 85. It appears in that case that one DuBois was in business at Union, in this state, and desiring to raise two thousand dollars in cash, he applied to William Rice to indorse a note for that amount at a bank in the city of Columbia, South Carolina. When DuBois applied to Rice, the note already had the name of John Gist, as payee and indorser thereon. Rice paid the two thousand dollars in cash, and carried the note to the bank, where, upon his indorsement, the bank cashed the note for him. Before the maturity of this note, DuBois applied to Glenn and Shelton to indorse a new note, also payable at the bank, for a like sum, to renew the first note, on which John Gist and Rice appeared as indorsers. They did so, Glenn being first indorser and Shelton second indorser. This note was sent by DuBois to Rice, who was then in Columbia, with twenty dollars in cash, directing said Rice to carry the note to the bank for discount in substitution of the first note. Before Rice could apply to the bank with this second note, Glenn became alarmed as to DuBois, and at once wrote to the bank, refusing to stand as indorser on the note and also making demand upon Rice for the note he had indorsed and

in Rice's hands as aforesaid. Rice refused to deliver the note. Afterward Rice died. It was found by a jury that John Gist's name on the note was a forgery, and Rice had to pay the first note to the bank. Therefore, Rice's executors tried to hold Glenn responsible on his note. Glenn had received a mortgage from DuBois to protect him as indorser. DuBois's general creditors attached his property ⁷⁵ and obtained judgments for their respective debts. Glenn and the executors of Rice made this agreement, that Glenn would confess a judgment for the two thousand dollar note, and that the executors of Rice would satisfy the same of record at once, but Glenn was to execute the transfer of the mortgage DuBois had given him to such executors. This agreement was fulfilled. The general creditors of DuBois, whose claims had been reduced to judgment, claimed that such assignment of the mortgage by Glenn to the executors of Rice was null and void, as Glenn had not in fact any claims against DuBois, and, therefore, DuBois' mortgage to Glenn was a nullity. The court held that Glenn, as an accommodation indorser on DuBois' note made payable at the bank and in the hands of Rice, as DuBois' agent for that purpose, had a perfect right to withdraw from his engagement as such accommodation indorser at any time before the note was negotiated at the bank, and also that the note was in the hands of Rice, purely as the agent of DuBois, to be negotiated at the bank to renew the old note, and that Rice could not divert it to any other purpose. The court adjudged that no rights in Glenn as to the mortgage of DuBois to him had any existence. It will be seen that in the case just considered, no consideration passed from Rice to DuBois on the second note; hence this decision does not antagonize the position I have taken in the case at bar, but this case is authority for the position that an accommodation indorser may withdraw his name from a note at any time before the note is actually negotiated. I make this observation to dispose of any question, if it had been made (and it was not), that the city council had no right to withdraw their intended indorsement as accommodation makers of these notes. No actual negotiation of such notes for value had been made when the mayor and city clerk erased their names as accommodation indorsers. But no such question is raised in this case, and therefore this discussion is unwarranted. I cannot agree ⁷⁶ that the circuit judge committed any error in his charge, as pointed out in the exceptions here presented.

The last exception relates to the matter of an increase in the amount of the judgment over the verdict rendered.

This court, in law cases, is confined to the correction of errors of law in the court below. I see no evidence in the "case" for appeal that any such question has been presented to or passed upon by the circuit judge. This seems to me, therefore, the first time any court has had its attention called to this matter. I must decline to consider it, but without prejudice to any application to the circuit court for a correction in the amount of the judgment in excess of the verdict.

The foregoing presents my own views of the merits of this appeal, and I think the judgment of this court should be: It is the judgment of this court, that the judgment of the circuit court be affirmed. But the majority of the court think otherwise, and, therefore, as the organ of the court, I announce its judgment, that the judgment of the circuit be reversed, but I dissent from that judgment.

McIVER, C. J., dissenting. I dissent. It must be remembered that this appeal involves only the right of sureties, who, as is well settled, are entitled to stand upon the terms of this contract as expressed in the paper evidencing such contract. Here, by the express terms of the notes, which constitute the only evidence of the contract which the plaintiff is seeking to enforce, the appellants bound themselves to pay to "W. E. Beattie, cashier, or order, negotiable and payable at the National Bank of Greenville, S. C.," a specified sum of money. This obligation, by its terms, rendered appellants liable to pay to said Beattie, or to any person to whom he might legally transfer such obligation, the sum of money specified therein, and did not create any liability to pay the same to any other person. When the plaintiff brought this action to enforce performance of the contract of appellants, ⁷⁷ it must not only show that appellants executed said notes (as to which there is no dispute), but it must also show that the same have been duly transferred to the plaintiff by the payee named in said notes, or some subsequent lawful transferee thereof; and as to this, it seems to me that the plaintiff has failed to make out its case. The undisputed testimony, introduced by the plaintiff itself, shows that the plaintiff never acquired a legal title to the notes. Beattie never acquired a legal title to these notes, as he expressly refused to accept them; and, if he acquired no legal title, I do not see how he could transfer any title to the

plaintiff. These facts were expressly made known to the plaintiff through its treasurer, Bostick, who was the agent of plaintiff in the transaction, and notice to the agent was notice to the principal; the plaintiff cannot, therefore, claim to be an innocent holder for value without notice. If plaintiff had acquired these notes in the regular course of business without notice, then the result would, perhaps, be different. Of course, if Ormand & Goforth received the money specified in the note from the plaintiff, as the testimony seems to show, then they would be liable upon that ground; but not so as to appellants, who are mere sureties, and can only be held liable on their contract as they made it. They could not be held liable to Beattie, because he never accepted the notes, and never made any contract with them, and they cannot be held liable to any person to whom he transferred the notes without authority, who had notice of such want of authority.

Mr. Justice Jones concurs in the dissenting opinion of the chief justice.

GARY, J., dissenting. As I do not concur in the opinion of Mr. Justice Pope, I will state briefly the grounds of my dissent. After the notes were signed by Ormand & Goforth, as principals, and R. J. Dunlap, L. R. Williams, and L. K. Armstrong, as sureties, they were indorsed by W. W. Gilreath, mayor, and T. J. Bostick, clerk ⁷⁸ and treasurer, of the city of Greenville, by authority of the city council of Greenville. The plaintiff thus became a cosurety with the other sureties who had signed the notes. At the time the city council of Greenville indorsed the notes as aforesaid, it knew that R. J. Dunlap, L. R. Williams, and L. K. Armstrong were sureties on said notes. When Hamlin Beattie, as president, and W. E. Beattie as cashier, of the National Bank of Greenville, indorsed the notes, in the manner set forth in the opinion of Mr. Justice Pope, the city council of Greenville was a cosurety with the other sureties. It was after the notes were indorsed by Hamlin Beattie and W. E. Beattie, as aforesaid, that the city council of Greenville erased its indorsement upon the notes. As the plaintiff was a cosurety with the other sureties, at the time it alleges in the complaint that it became the lawful owner and holder of said notes, his honor, the presiding judge, was in error in charging the jury: "If you believe the testimony of the plaintiff, that these notes were executed by Ormand & Goforth, as principals, and that these other defendants signed as

sureties; that the note was a negotiable note—that is, a note not sealed—made payable to W. E. Beattie, as cashier, and Beattie indorsed that note, and the city council of Greenville advanced the money for the value of the note, then I charge you, as matter of law, that the city of Greenville is entitled to recover the full amount they have asked for here.” Under this charge the jury had the right to render a verdict in favor of the plaintiff for the full amount mentioned in the notes, although they might have believed from the testimony that the plaintiff was liable as a cosurety.

Furthermore, whatever other right the plaintiff may have acquired in the notes, it did not become the lawful owner and holder thereof by the indorsement of the officers of the National Bank of Greenville, as alleged in the complaint, for the following reasons: The notes were executed for the purpose of raising money by discount, which fact was known both to W. E. Beattie, cashier, and the plaintiff herein. ⁷⁹ As W. E. Beattie, cashier, did not discount the notes, which was the condition upon which he was to become the lawful owner and holder thereof, he did not acquire such rights; and as the plaintiff had notice of these facts, it could not become the lawful owner and holder of the notes by the indorsement of W. E. Beattie, cashier, as alleged in the complaint. W. E. Beattie, cashier, occupied the position of the payee of a note in possession thereof without consideration, and, therefore, void. The plaintiff, with knowledge of these facts, could not, by the indorsement of W. E. Beattie, cashier, become the lawful owners and holders thereof.

I, therefore, think the judgment of the circuit court should be reversed, and the case remanded to that court for a new trial.

EVIDENCE—SECONDARY—ACCOUNT-BOOKS.—Secondary evidence of the contents of books of account is admissible only when the absence of the books is accounted for: *Hunt v. Roylance*, 11 Cush. 117; 59 Am. Dec. 140; *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600.

NEGOTIABLE INSTRUMENTS—RIGHTS OF ACCOMMODATION INDORSERS—WITHDRAWAL.—An accommodation indorser may withdraw his indorsement at any time before the note is discounted, unless rights for a valuable consideration have in the meantime attached in others: See monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 752.

NEGOTIABLE INSTRUMENTS—RIGHTS OF BONA FIDE PURCHASERS—ACCOMMODATION PAPER.—An accommodation note is valid in the hands of a bona fide holder for value: *Second Nat. Bank v. Howe*, 40 Minn. 390; 12 Am. St. Rep. 744; *Cottrell v. Watkins*, 89 Va. 801; 37 Am. St. Rep. 897. As against a holder for value, an accommodation maker of a note can defend only on the ground of actual payment. The fact that it is made for accommo-

dation, and without consideration, is immaterial: *Philler v. Patterson*, 168 Pa. St. 468; 47 Am. St. Rep. 896. The rights and liabilities of makers and indorsers of accommodation paper, and the defenses available to them, are discussed in the monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745-757. See, also, extended note to *Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 135-138.

APPEAL—OBJECTIONS FIRST MADE ON APPEAL.—It is a general rule of appellate procedure that objections not raised at the trial will not be considered for the first time on appeal if the objection is not jurisdictional: *O'Brien v. Stambach*, 101 Iowa, 40; 63 Am. St. Rep. 368; *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560; *Reich v. Cochran*, 151 N. Y. 122; 56 Am St. Rep. 607, and note.

WADE v. COLUMBIA ELECTRIC STREET RAILWAY, LIGHT, AND POWER COMPANY.

[51 SOUTH CAROLINA, 296.]

RAILROADS—DUTIES AND LIABILITIES TO PASSENGERS.—If a railroad company properly discharges, with due diligence, its duties toward its passengers, it is not liable to them for injuries arising from a cause over which the company has no control, or from the conduct or misconduct of the passenger to which the company does not contribute, or from the misconduct of the passenger, that being the primary cause.

NEGLIGENCE—QUESTION OF LAW OR FACT.—If only one inference can be drawn from a given state of facts, then, whether they constitute negligence is a question of law, but, if the facts are susceptible of more than one inference, then the question of negligence is one of fact for the jury to determine under proper instructions.

RAILROADS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.—If a passenger's injury, received in jumping from a car results from a rash misapprehension of danger which does not exist, and the injury sustained is attributable to rash conduct on his part, he cannot recover.

JURY TRIAL—INSTRUCTIONS.—The court is not compelled to charge in the exact language of the request; and the party presenting it has no cause of complaint if the proposition of law contained in the request is charged in different language.

The complaint in this action was as follows:

"1. That the said defendant, 'The Columbia Electric Street Railway, Light, and Power Company,' is a corporation, duly incorporated under the laws of the state of South Carolina, and was such corporation at all the times hereinafter mentioned, and engaged, pursuant to their charter, as common carriers in transporting passengers over the line of its railroad in the streets and suburbs of the city of Columbia, in the state aforesaid, in cars owned and operated by defendant, by means of electric power.

"2. That on the twenty-third day of September, 1895, at or about 7 o'clock in the evening, the said plaintiff was received by said defendant as a passenger on one of its cars, at the Gervais street crossing in Waverly, a suburb of Columbia, going from its Shandon terminus toward and into the said city, the said plaintiff paying the full fare charged for her carriage, and intending to go into said city, the said defendant, in consideration of said payment, agreeing to so carry her.

"3. That when the said car thereafter reached what is known as the 'Heidt Siding,' in the said Waverly, the said car stopped on the main line of the railway track of said defendant in such position that another of defendant's cars going in an opposite direction could pass over said siding, around the car in which plaintiff was seated as a passenger; and it was the duty of said defendant to so move its cars and arrange its switches that the passage of these two cars would be accomplished without injury or peril to any of its said passengers.

"4. But the said defendant, not regarding its duties in this regard, caused the said other car to approach this plaintiff's said car with great and dangerous speed, and negligently omitted to have its switch so fixed that said other car would safely pass around this plaintiff's car; but, on the contrary, this switch was not open and the said other car kept upon the main line past the switch, and continued to approach said standing car with great and dangerous speed, to the imminent danger of a collision with the standing car, and imminent peril to all the passengers therein.

"5. That by reason of this apparent imminent danger to the passengers in said standing car, the plaintiff, in common with other passengers, believed that it was unsafe for her to remain in said car, and it was apparently so unsafe; and in order to free herself from such danger, she was obliged to jump from said car, and did so jump, at the only point of said car where egress to her was possible, and in so doing plaintiff was much frightened and greatly injured, her right ankle being badly sprained, so much so that she had to be carried back to her home and put to bed.

"6. That by reason thereof the plaintiff was confined to her bed for three weeks, suffered pain for several months, and was prevented from attending to her labors and duties, was put to great expense for doctor's attendance, medicines, and nursing in the attempt to effect a cure, and was otherwise injured, to her damage two thousand dollars.

"Wherefore, the plaintiff demands judgment against the defendant for the sum of two thousand dollars and costs."

The defendants filed the following answer:

"For a first defense: 1. Admits the allegations contained in the first paragraph of the complaint; 2. Denies each and every other allegation of said complaint.

"For a second defense: This defendant alleges upon information and belief that the plaintiff is afflicted with rheumatism, and without notifying the conductor of the car upon which she was riding of that fact, or of any desire to alight from the car at the point mentioned in the complaint, of both of which facts he was ignorant, the plaintiff carelessly alighted and jumped from the car without assistance, and thereby herself caused the injury, after being warned and told by the conductor that there was no danger of a collision with the car standing in front of the one upon which she was riding; and that if any injury and damage happened to said plaintiff, it was not caused by any negligence on the part of the defendant or their servants, but was owing to her own negligence and fault as aforesaid.

"Wherefore, the defendant demands that the complaint be dismissed with costs."

"Judgment for plaintiff for four hundred dollars, from which defendant appeals."

J. T. Sloan and W. H. Lyles, for the appellant.

R. Aldrich and R. W. Shand, for the appellee.

²⁰⁰ GARY, J. In order to understand clearly the questions raised by the exceptions, it will be necessary to report the complaint and answer.

The first exception is as follows: "1. Because his honor, after charging the jury that 'the defendant company, as a common carrier, is required by law to discharge each and all of these duties in a reasonable and safe and ordinary and proper manner, and, if it is in default, if it is wanting in the proper care and attention to these matters, and through its negligence—that is, the want of ordinary and proper care—a passenger who is upon this train, being transported under a contract for hire, is injured, then the railroad company is liable for such injuries,' he proceeded to charge: 'If the railroad company, on its part, is properly discharging with due diligence, and in a suitable manner, its duties, and a passenger is hurt from a cause disconnected, over which the railroad has no control,³⁰⁰ or if

the passenger is hurt by reason of his own conduct or misconduct, and the act or doing of the railroad company in no way contributed toward it, or if the passenger's misconduct was the primary or real reason of his or her injury, the railroad company would not be responsible'; thereby indicating: 1. That even though the railroad company was properly discharging with due diligence, and in a suitable manner, its duty, it would be liable for injuries caused to the passenger, unless the cause of such injury was wholly disconnected with the operation of the train; and 2. That even if the injury resulted from a cause to which the plaintiff contributed in any way, the railway company would be liable, if its act in any way contributed to the injury." When the entire sentence is read, it will be seen that there are three contingencies mentioned under which the railroad company would not be responsible. The construction of his honor's language, for which the appellant contends, cannot be sustained: 1. Because the words, "or if the passenger's misconduct was the primary and real reason of his or her injury, the railroad company would not be responsible," show that it was free from error; and 2. Because, when the entire sentence is construed in connection with the subsequent charge of the presiding judge, upon the question of contributory negligence, it also negatives the construction for which the appellant contends. The subsequent charge to which we refer is as follows: The defendant requested the presiding judge to charge: "That if the jury believe from the evidence that the plaintiff contributed to her own injury, or if, by the exercise of ordinary care, she might have avoided the consequences of defendant's negligence, she is the author of her own wrong, and cannot recover," his honor said: "That is taken from the case of *Freer v. Cameron*, 4 Rich. 228, 55 Am. Dec. 663, and *Renneker v. South Carolina R. R. Co.*, 20 S. C. 219, which are two cases decided in this state, and the request does state a correct proposition of law, and I so charge it to you; but I will have something else to say along that line in connection with some of the other requests." The defendant ³⁰¹ also requested his honor to charge: "That if the jury believe from the evidence that the injury complained of was caused by the mutual default of both parties, they must remain in statu quo, for there can be no legal injury where the mischief is the result of the common fault of both, and she cannot recover." His honor said: "That is correct; if both are equally responsible legally for the injury, she cannot recover." The first exception is overruled.

The second exception is as follows: "2. Because his honor,

the circuit judge, refused to charge, as requested by the defendant, that if the jury believe from the evidence that the plaintiff was injured by jumping from the car, in spite of being warned by the conductor not to jump off, and being told there was no danger, and that she was wanting in ordinary care, and is chargeable with contributory negligence, she cannot recover." The presiding judge said: "I cannot charge you that proposition in the terms in which it is stated; because whether she was warned by the conductor not to jump off the car is a question of fact, and whether the conductor's warning her not to jump off the car, and afterward jumping, constituted contributory negligence on her part, is a question of fact also for you. If the jury were to find that a person of ordinary and reasonable sense and prudence would have jumped, notwithstanding the warning, because of an honest belief that the danger was there and then impending to her life or her person, then she would be excusable and would have a right to jump, no matter if the conductor did warn her. Those are questions of fact which you must determine from the testimony." The error in this request is, that it implies, as matter of law, that the plaintiff was guilty of negligence if she jumped from the car and was injured, in disregard of the warning mentioned in the request; whereas, whether a disregard of such warning constituted negligence was a question to be determined by the jury. In a case where only one inference can be drawn from a given state of facts, then, whether they constitute negligence is a question of ³⁰² law to be decided by the court. But where, as in this case, the facts are susceptible of more than one inference, then the question of negligence must be left to the consideration of the jury, under proper instructions from the court—negligence being a mixed question of law and fact. This exception is overruled.

The third exception is as follows: "3. Because his honor, in modification of defendant's request to charge, charged as follows, to wit: 'That is correct, because where one acts rashly and not in accordance with what persons of average or ordinary sense and intelligence would do, and that rash conduct contributed to the injury, and the injury would not have existed save for her rash conduct, why then she could not recover, and I so charge you'; thereby indicating that even if the plaintiff contributed to her injury, she could recover unless her negligence was the sole cause of the injury." The defendant requested the presiding judge to charge: "That if the jury believed from the evidence that the plaintiff's act in jumping from the car resulted

from a rash apprehension of danger, which did not exist, and the injury which she sustained is to be attributed to rashness and imprudence; she is not entitled to recover"; whereupon his honor charged the request in the language set out in the exception. The intention of the presiding judge was simply to present to the jury the proposition of law embodied in the request in different language, but not to limit the proposition of law stated in the request in any manner. His language was explanatory, and, when construed in connection with the request, and other portions of the charge, was not misleading. This exception is overruled.

The fourth and fifth exceptions are as follows: "4. Because his honor refused the request of the defendant to charge as follows: 'The plaintiff cannot recover exemplary damages in this case unless the jury find that the injury was caused by the malicious, oppressive, or reckless negligence of the company's servants.' 5. Because, in connection ³⁰³ with his refusal of the request last above referred to, his honor charged as follows: to wit: 'Now, exemplary damages, sometimes termed "smart money," is given where one has injured another by his rash conduct, by being guilty of malicious conduct—that is, doing a thing intentionally, by oppression, guilty of oppression, or doing acts in a reckless, wanton way, from which injuries result, such as recklessness. In such cases, where there is malicious oppression and recklessness, and these acts cause injury to a person, then the jury, as an example, to deter others in like circumstances from repeating such acts, and to punish them for such conduct, may find damages of that character, exemplary or punitive damages. Now, for this case, if the testimony has satisfied you that the plaintiff is entitled to recover, you will award her such damages, not exceeding two thousand dollars, as you may think, under the testimony in the case, she is entitled to; thereby indicating to the jury, 1. That punitive damages, or smart money, is given as a matter of right, and if they found the existence of the facts referred to, it was their duty to give it, and that it was not a matter suitable for their discretion; and 2. That mere recklessness or rashness would justify the jury in awarding punitive damages; and 3. Thereby indicating that, under the issues joined, the jury might award her damages in excess of the compensatory damages for which she may have proved herself entitled.'" The plaintiff did not claim punitive damages, nor did she present any requests to charge as to such damages. When the defendant re-

requested the presiding judge to charge, as stated in the fourth exception, he said: "I cannot charge you that request in the terms there stated. I will instruct you the law governing it."

After charging the plaintiff's requests in regard to damages, his honor then said: "Damages are asked in this complaint. You heard the testimony upon that subject. I need call your attention to two or three kinds of damages known in the administration of justice. One is compensatory damages, by which term is meant that persons are entitled, ³⁰⁴ if the jury find that they are entitled to that kind of damage, to such compensation as will make them whole, pay for the actual loss they have sustained and for the loss that has accrued from the result of such injury." The presiding judge then proceeded to charge, as stated in the fifth exception. As hereinbefore stated, the plaintiff did not claim punitive damages, and the request was, therefore, not responsive to any issue made by the pleadings. But even if it was such a request as should have been charged, the defendant got the benefit of the proposition of law therein contained, in language which explained the law more fully than the request itself. A judge is not compelled to charge in the exact language of a request, and the party presenting the request has no cause of complaint if the proposition of law contained in the request is charged in different language, as was done in this case. The fourth exception is overruled.

After a careful reading of the language of the presiding judge, set forth in the fifth exception, we fail to see how it indicates that for which the appellant contends. The word "malicious" is used several times in connection with the oppression and recklessness therein mentioned; and the word "may" is used in speaking of the jury's right to award punitive damages, under the circumstances therein mentioned. The words, "you will award her such damages, not exceeding two thousand dollars, as you may think, under the testimony in the case, she is entitled to," show that the jury could only find a verdict for such damages as were warranted by the testimony. The fifth exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

RAILROAD COMPANIES—DUTIES AS TO PASSENGERS—
NEGLIGENCE OF PASSENGER.—A railway company is under the duty of exercising extraordinary diligence for the safety of its passengers: *Gardner v. Waycross etc. R. R. Co.*, 97 Ga. 482; 54 Am. St. Rep. 435, and note. But passengers cannot recover if they voluntarily assume a position of peril from which injury results to them:

Jammison v. Chesapeake etc. Ry. Co., 92 Va. 327; 53 Am. St. Rep. 813, and note. However, where a passenger, through the negligent or unskillful operation of its trains by a railroad company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he is entitled to recover damages, although he would not have been injured if he had remained on the train: *St. Louis etc. Ry. Co. v. Murray*, 55 Ark. 248; 29 Am. St. Rep. 32, and note. A similar liability may arise where a passenger is induced to jump from a moving train by terrifying acts and exclamations of a brakeman in the car, leading the passenger to believe that a collision is imminent: *Ephland v. Missouri Pac. Ry. Co.*, 137 Mo. 187; 59 Am. St. Rep. 498; but there must be some connection between the company and the cause of a passenger's panic to raise such liability: *Reary v. Louisville etc. Ry. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497, and note.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY.—Negligence is a question for the jury where the facts are disputed, or where, from undisputed facts, different minds may reasonably draw different conclusions as to the existence of negligence: *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; 58 Am. St. Rep. 709, and note; *Lowe v. Salt Lake City*, 13 Utah, 91; 57 Am. St. Rep. 708, and note; *Fox v. Oakland Consolidated Street Ry.*, 118 Cal. 55; 62 Am. St. Rep. 216, and note.

INSTRUCTIONS.—A court is not required to give instructions, through proper, and such as the party is entitled to, in the very terms asked; and if they are embodied substantially in the charge given, it is sufficient: *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503. See *Jordan v. Benwood*, 42 W. Va. 312; 57 Am. St. Rep. 859, and note.

POLLOCK v. CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION.

[51 SOUTH CAROLINA, 420.]

BUILDING AND LOAN ASSOCIATIONS.—Loans made by a building and loan association to a member thereof are not partnership transactions; and all moneys paid in, whether before or after loans, must be credited by the association on the debt.

BUILDING AND LOAN ASSOCIATIONS ARE REQUIRED, in determining the amount due under a mortgage from a member who has assigned his shares to such associations, to deduct the amount of dues paid on such shares before, as well as after, the execution of the mortgage.

USURY—BUILDING AND LOAN ASSOCIATIONS.—A transaction by which a building and loan association charges a borrowing member six per cent interest, and also a premium of six per cent, is not usurious, although the highest legal rate is eight per cent; but such association is required to give credit to the borrower for the amount of premiums paid as payment on the principal debt.

BUILDING AND LOAN ASSOCIATIONS—PROVISIONS IN A BOND given by a member to a building and loan association, stipulating that upon failure to pay monthly installments for ninety days after maturity the whole sum borrowed shall become due with interest, do not authorize the association, upon default, to recover

the whole sum borrowed without giving credit for payments made, whether as dues, fines, premiums, or otherwise.

BUILDING AND LOAN ASSOCIATIONS—CONFLICT OF LAWS.—A contract between a building and loan association organized in one state and a member thereof residing in another state, providing for payment in the former state or to a local treasurer in the latter state, must be treated as a contract to be performed in the former state in determining whether the transaction is usurious.

USURY—CONFLICT OF LAWS.—If a contract is made in one state, to be performed therein, an agreement to take and receive interest, and to construe the contract in this respect by the laws of another state allowing a higher rate of interest, cannot be enforced in the latter state.

APPELLATE PRACTICE.—FINDINGS OF FACT cannot be disturbed on appeal, unless without testimony to support them, or manifestly against the weight of evidence, although the constitution of the state provides that findings of fact, as well as of law, may be reviewed on appeal.

CONTRACTS—CONSIDERATION.—Confidence induced by the promise of the cashier of a bank to receive money on deposit to be held subject to instructions is a sufficient legal consideration to hold the bank to the performance of the promise.

R. T. Caston and W. F. Stevenson, for the appellant.

E. McIver and W. P. Pollack, for the appellee.

⁴²¹ **BUCHANAN, J.** On the fifth day of February, 1892, Mrs. R. J. Pollock subscribed for fifteen shares of stock in the Carolina Interstate Building and Loan Association. From the fifth day of February, 1892, to the tenth day of September, 1892, she paid the association in the way of admission fees and monthly installments, of \$10.50 each, the sum of \$88.50. On an assignment of her shares she borrowed from the association on the fifth day of October, 1892, the sum of \$1,500. As part of the same transaction, she mortgaged her house and lots. The condition of her bond was that she should pay to the association the monthly sum of \$25.50 (the sum of \$10.50 being the monthly installments on said shares, the sum of \$7.50 as interest on the sum borrowed, and the sum of \$7.50 as premium), on the fifth day of each month, until the said shares of stock shall have reached their par value of \$100 each. This was followed by a proviso that if the said R. J. Pollock failed to pay said monthly installments for ninety days from the time the same became due, then the whole sum borrowed, \$1,500, should become due, with interest at the rate of six per centum per annum. On the eighth day of February, 1893, Mrs. R. J. Pollock conveyed the mortgaged premises, and assigned her stock to the plaintiffs, ⁴²² who assumed her contract with the as-

association. The mortgaged property was insured by the plaintiffs for \$2,500—the loss, if any, payable to the association as its interest might appear. From the fifth day of October, 1892, to the fifteenth day of June, 1894, Mrs. Pollock and her assignees, the plaintiffs herein, paid to the association twenty-one monthly payments of \$25.50 on the said debt, the sum of \$535.50, making in the aggregate, with the \$85.50 previously paid, the sum of \$624. After the destruction of the house (part of the property mortgaged) by fire, which occurred on the tenth day of October, 1894, some question arose between the parties as to whom the insurance money should be paid, and the amount that should be paid to the association. The association, it seems, claimed that \$1,293.43 was still due under the mortgage, and refused to release the policy of insurance until this sum was paid. The plaintiffs denied that so much was due. The plaintiffs could get no part of the insurance money until the policy was delivered up, and as the association would not give up the policy until the amount of \$1,293.43 claimed by it was paid, the plaintiffs agreed to pay the whole amount of \$1,293.43 claimed by the association to the defendant, the Bank of Cheraw, under an arrangement agreed to by the bank that the whole amount claimed by the association was to be held by it until the amount due by the plaintiffs to the association could be adjusted and ascertained. The sum was paid over to the bank. On the same day the plaintiffs gave the bank written notice, forbidding it to pay more than \$876 to the association; the bank, however, did pay over to the association the full amount claimed by it, it is charged, without plaintiffs' knowledge, and without waiting to ascertain what was due on the mortgage debt. Indemnity was taken by the bank from the association to protect itself in its action. This payment was made on the fourteenth day of January, 1895. The association had thus collected on its mortgage debt the sum of \$1,917.43, not including interest on the payments made, although the contract rate of interest was six per cent. The ⁴²³ money was borrowed on the 5th of October, 1892, and the last payment was made two years, three months, and nine days thereafter. The plaintiffs began this action on the twenty-ninth day of July, 1895, to recover the excess paid the defendant association. Both of the defendants demurred to the complaint, among others, upon the ground that the plaintiffs, not being parties to the original contract, could not plead usury. It was held by the court that while this was true, nevertheless,

the allegations were sufficient to maintain an action for money collected in excess of the contract, and also that the Bank of Cheraw was properly joined as a party to the suit. This ruling was sustained on appeal: *Pollard v. Carolina etc. Assn.*, 48 S. C. 65; 59 Am. St. Rep. 695.

The issues were referred by the order of his honor, Judge W. C. Benet, to Mr. G. J. Redfearn to take the testimony and report. The cause came on to be heard before his honor, Judge Klugh, at the June term (1897) of court for Chesterfield county. The case was heard upon the pleadings, testimony taken before the referee, and exceptions taken to the same. In due time a decree was filed in favor of the plaintiffs' contention, from which an appeal to this court was taken. The exceptions, several in number, relate really to: 1. What is a proper construction of the contract between Mrs. R. J. Pollock and the association, and what was due under the contract on the twenty-fourth day of December, 1894; and 2. Was the finding of fact by the circuit judge, that the Bank of Cheraw agreed to hold the money paid by the plaintiffs till it could be ascertained what was due, borne out by the facts, and, if true, did such cashier have the authority so to bind the bank, and was the promise, if made, without consideration? These grounds presented on behalf of the defendants will now be considered.

What is the proper construction of the contract entered into by Mrs. Pollock with the Carolina Interstate Building and Loan Association? What was due under the contract on December 24, 1894. The assignees of Mrs. Pollock are the plaintiffs here, and their rights are to be measured by the rights of Mrs. Pollock under the contract. ⁴²⁴ They stand in her shoes, and must comply with her contract. If they are to receive anything, it is to be the same in amount that would have been received by her. What is the nature of the transaction? In this state, from the time of the decision of *Bollinger's (Columbia etc. Association v. Bollinger*, 12 Rich. Eq. 124; 78 Am. Dec. 463;) case (1860), our courts have held that such a dealing as considered here was a loan—not a partnership transaction. Chancellor Carrol, who had heard the case on circuit, was impressed with the view that it was a transaction between parties. Chief Justice O'Neil, writing the opinion in the appeal court, speaking for the court, overruled this view, and laid down the rule, still followed, that the matter was to be treated as a loan. This rule was admitted as settled in *Mechanics' etc. Ass. v. Dorsey*, 15 S. C. 462, and the late case of *Buist v. Bryan*, 44 S. C. 121;

51 Am. St. Rep. 787. In the last case cited, Mr. Justice Gary, in a carefully considered opinion, speaks of the above authorities as having established the rule that "the money advanced was a loan"; that "the borrower is entitled to a credit not only for the amount paid as interest, but also for the amount paid for subscription on the shares of the stock, in ascertaining the amount due on the mortgage. . . . It will thus be seen that in determining the amount due under the mortgage, the association was required to deduct not only the amount of the dues paid after the execution of the mortgage, but also the amount of those paid before the execution of the mortgage." Again: "That upon the determination of his contract with the association as originally contemplated, the mortgagor is entitled to credits on his mortgage both for the amounts paid as interest and also as dues on his shares of stock. That where the amounts paid by the mortgagor, as interest and dues, aggregate a sum equal to the amount the mortgage was given to secure, a complaint for foreclosure of the mortgage will not be sustained." Continuing he says: "The assignment and transfer of the shares of stock by the mortgagor as collateral security for the loan, and consolidating the interest and dues in the mortgage, ⁴²⁵ show that the amount paid monthly, consisting of interest and dues, is to be regarded as what is called 'redemption money,' and raises an implied agreement that such payment shall be credited on the mortgage." The syllabus to the case lays the rule down as follows: "All former payments of monthly dues and interest shall be credited on the mortgage debt, and if they are sufficient, at the contract rate of interest, to extinguish the debt, a complaint for foreclosure cannot be sustained; but if insufficient, the payments of dues and interest must be applied as credits on the bond." Now, in the light of this decision, what was the contract, what are the rights of the plaintiff here, and was the debt to the association overpaid? On the fifth day of February, 1892, Mrs. Pollock subscribed for fifteen shares of the stock of the association; up to the fifth day of October, 1892, she had paid \$88.50, when she borrowed from the association the sum of \$1,500. On the eighth day of February, 1893, the conveyance of the property and her assignment of her stock in the association was made to the plaintiffs. From the time she borrowed the money (\$1,500) up to the fifteenth day of June, 1894, she and her assignees paid \$535.50, aggregating in all \$624. The plaintiffs then defaulted and paid no more. The obligation of the bond required Mrs. Pollock, and her assignees

who took her place, to pay each month, after she borrowed, the sum of \$25.50, the sum of \$10.50 being the monthly installments due on the shares of stock, the sum of \$7.50 as interest on the sum borrowed, which a calculation will show was exactly six per cent per annum on the sum borrowed, and the sum of \$7.50 as premium.

The contract on its face is not usurious; it is within the amount allowed to be charged. It is to be observed that the rate is below what is ordinarily charged as interest for money borrowed in this state. The rate allowed by law is seven per cent except, where the contract upon that point is in writing, as high as eight per cent is permitted by the act. Here the contract calls on its face for interest ⁴²⁶ at six per cent merely. The difficulty arises here. The plaintiffs having paid the contract rate of interest (six per cent), is credit to be allowed them for the payment of a sum equal to six per cent (additional) on the amount borrowed as an alleged "premium"? Having paid the debt with the contract interest, shall the other monthly payments—\$10.50 on the shares and the \$7.50 as premium—be credited on the debt? This arrangement of charging only six per cent on the face of the contract, yet requiring an additional payment each month equal to another six per cent, which is called "premium," doubtless was to avoid the usury laws and at the same time collect an excessive interest. Having stated in the bond that the contract rate was six per cent as "interest" on the principal, are they not bound by it as "interest?" Ought they not to be compelled to credit any other payment over and above the said six per cent on the principal of the debt? Should the association not be compelled to credit them with the other collections made each month? The charge of six per cent on the face of the contract was to avoid the usury laws. They have charged six per cent, but, in addition, they require an additional monthly payment equal to another six per cent charge, and call it premium. But having in their bond stated the "interest" to be only six per cent, they can't refuse to credit on the principal of their debt the other collections which they made the plaintiffs pay each month. The bond is not usurious, but the association attempted to enforce it usuriously. The sole question (and the whole question here) is, are the plaintiffs entitled to have credited on the bond what they have paid each month in addition to the contract rate of interest? Now, it so happens that the supreme court of North Carolina has construed a similar contract made by this very association (Strauss

v. Carolina etc. Assn., 117 N. C. 308, 53 Am. St. Rep. 585), in a suit brought to determine what was due on a bond of a borrowing stockholder, the provisions of which were exactly similar to the ⁴²⁷ one now before this court. In that case, the question of usury was not involved, the association having failed, or gone into the hands of a receiver; but the contract was construed, the court laying down the rule that the borrowing member shall be charged with the amount actually received by him, with six per cent interest, and credited with the amounts paid by him as of the time of payment, "whether paid as dues, fines, premiums, or in any other manner." This is the settlement of the North Carolina courts. This is the settlement this very association has been ordered to make with its borrowing members in North Carolina.

Was this a contract to be performed in North Carolina? It seems that payments were to be made in Wilmington, North Carolina. Payments were to be made to a local treasurer in this state, if the member so desired. There were branch offices in this state. Payments might have been made within or without the state. This feature of payment to a local branch in this state, or to the general offices of the company in another state, is a familiar one in this class of cases. It cannot be told in advance always into what state a building and loan association may extend its business. The rates of interest vary with the different states. In some states it may be lower than in the state of its incorporation, in others it will be higher, so an arrangement is made that may be helpful to the association in obtaining the interest of the state allowing the greater interest. The arrangement of payment at the local office, with certain regulations, or that at the general office required in the first instance, may be used as "business principles" may require. The payment to be made with reference to the laws of the state of incorporation, or the use of similar language equally noncommittal as to the place of payment or the place of contract. The language used is adapted to that construction which the policy of the company in any particular case, moved by its interest, may direct. The actual determination of the question of whether the contract is to be considered a South Carolina contract or not (with this ⁴²⁸ election on the part of the borrowing member here), is so dependent on the establishment of the local branches, and their continuance, and the regulative conditions so much in the power of the company, that oftentimes a contract that may be performed and dissolved within the state at

the election of the borrowing member when he makes his debt, by matter arising subsequently, becomes payable beyond the state, and this without anything done on the part of the borrowing member. Add to this the various provisions (found so frequently in this class of cases) where payments are made to the local agents or members of a local branch, providing that such agents shall be considered the agent of the member paying merely and not the agent of the company, and we have a transaction hard to decide. The difficulty is not in the law—it is in the application of it to the facts, and the ascertaining of what are the facts in the case. It has long been the law that parties may contract for interest according to the law of the place of contract, or for interest at the rate of the place of performance of the contract, although in the latter case it may be at a higher rate than at the place of making the contract. In the latter case, it is not opposed to the policy of either state—it is made in one state to be performed in another. Where the contract is made in the state, to be performed within the state, an agreement to take and receive interest, and to construe the contract in this respect by the laws of another state or country, which allowed a higher rate than allowed here, would not be enforced by our courts. The law would not allow persons to contract against the very letter of the act, and then nullify the plain prohibition of the legislature. Within the rules laid down, persons may contract for payment of interest, and if they are of age and under no disability, the court will enforce the contract. The cases of *Equitable etc. Assn. v. Vance*, 49 S. C. 402, and *Equitable etc. Assn. v. Hoffman*, 50 S. C. 303, held that such contracts for payment in another state are to be enforced according to the laws of the state where they are ⁴²⁰ to be performed and no more, following the accepted rule, and do not at all make against the general principle heretofore laid down, and whatever else appears in *Equitable etc. Assn. v. Vance*, 49 S. C. 402, was not necessary to the decision of the point in that case. This would appear from the carefully guarded opinion in the *Hoffman* case. This, I think, under the decisions, was a contract to be performed in North Carolina. “A contract by which the stock taken out by a borrower, and assigned to the association, when the mortgage is executed, is forfeited to the association, on default, without allowance of credit on the mortgage for the payment made on the stock, is unconscionable, and though upheld by the laws of the association’s own state, would not be enforced in North Carolina”: *Rowland v. Old Dominion etc. Assn.*, 116

N. C. 877. See, also, same case, reported in 115 N. C. 825. There was a provision in the bond that if Mrs. Pollock failed to pay the monthly installments therein provided for, for ninety days from the time the same became due, then the whole of said borrowed sum, \$1,500, should become due, with interest at the rate of six per cent per annum. This court, in commenting on this provision on the former appeal, said: "Did this provision mean that the whole sum borrowed should be returned without giving credit for the payments made? Would any court enforce so unconscionable a contract? The courts of North Carolina (Rowland v. Old Dominion etc. Assn., 116 N. C. 877; 115 N. C. 825), and of South Carolina (Buist v. Bryan, 44 S. C. 121; 51 Am. St. Rep. 787) have spoken in no uncertain terms, and have denied that upon such default the association may consider the whole amount forfeited in the face of the fact that payments have been made": See, also, opinion of the court of North Carolina in Strauss v. Carolina etc. Assn., 117 N. C. 308; 53 Am. St. Rep. 585. In the absence of any evidence to show that the association has ever sold, disposed of, or transferred the stock for any alleged default to itself, the consideration of the withdrawal value of current investment shares, and giving credit for the same upon the mortgage debt, becomes ⁴³⁰ unimportant in this case. It may be well said in passing, however, that where credit is required to be given for actual payments made, no evasion, however phrased, will be allowed to defeat their application. The North Carolina court have said this very association shall be compelled in that state to give credit to borrowers in that state for all amounts collected, whether collected as dues, fines, premiums, or in any other manner. 2. The exceptions of the Bank of Cheraw practically question the conclusions of the circuit judge on the facts. The wholesome rule that such findings of fact will not be disturbed, unless they are without testimony to support them, or manifestly against the weight of the testimony, was well settled in this state before the action of the last constitutional convention. Whether any change in the rule was made depends upon the construction of the provision inserted in the constitution upon the subject. The rule, therefore, has been laid down by the court in Visanska v. Workingmen's etc. Assn., 41 S. C. 546, where it is declared that: "Before this court will reverse the findings of fact by a circuit judge, even when based upon written testimony, we must be satisfied that the clear result of undisputed testimony points manifestly to a different conclusion from that reached by the

circuit judge. Where the testimony is conflicting, and the circuit judge has upon weighing it reached a conclusion which can be supported by the testimony, we will not interfere, although there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the circuit judge as to the comparative weight of the testimony": Quoting *Gary v. Burnett*, 16 S. C. 633. The supreme court not being a court of original jurisdiction—not being a court where actions or suits are begun in the first instance—must act, if at all, as an appellate court. Only matters brought up before it by exceptions from the lower court could be entertained under the power given it by the constitution and statutes—without such exceptions, or grounds of appeal, brought up to ⁴³¹ the court as laid down by the constitution and statutes, it could not act. If action should be taken without such appeal or exceptions from the lower court, such action would be beyond the powers given that tribunal. So that it was not constituted for the purpose of discussing the merits of cases, nor weighing nice questions of the sufficiency or insufficiency of evidence. This court could not enter into the trial *de novo* of the case. True, it was its duty to see there was no miscarriage of justice where the facts clearly made against the decision of the lower court. Some rule had to be laid down, and the above one was adopted. There is some difference in the phraseology of the constitution of 1895 from that of 1868. This difference grows out of the provision that the supreme court now "shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases, where the facts are settled by a jury and the verdict not set aside, and shall constitute a court for the correction of errors at law under such regulations as the general assembly may by law prescribe": Const. 1895, Art. 5, sec. 4. Still the constitution of 1868, article 5, section 4, provided that "the supreme court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the general assembly may by law prescribe." In *Land Mortgage Co. v. Faulkner*, 45 S. C. 508, the present chief justice, in discussing the change, says: "It seems to us that the real object of the change of phraseology in the present constitution was to impose an obligation upon the supreme court to accept as final the facts found by a jury in a chancery case, unless their verdict had been set aside. It would require very different language from that found in the present

constitution to satisfy us that its framers intended that our books of report should be loaded down with elaborate discussions of questions of fact, which could not possibly afford precedents in future cases. When a question of fact has been determined by an intelligent, disinterested, and ⁴³² experienced circuit judge, that certainly affords a reason for believing that his conclusion is correct; and it is incumbent upon the appellant to assume the burden of showing error therein; and unless he sustain that burden, the conclusions of the circuit judge should stand." In *Wagener v. Kirven*, 47 S. C. 347, Mr. Chief Justice McIver gives reasons in further vindication of the conclusion reached by the majority of the court, citing the views expressed in *Land Mortgage Co. v. Faulkner*, 45 S. C. 508. We think the circuit judge had ample testimony to warrant his findings of fact, whether received from the standpoint of the law of South Carolina or North Carolina, there was more paid to the association than six per cent, the amount it agreed to receive, and it shall account for the payments it received in excess of the amount to be paid under its contract.

It is claimed that the agreement of the cashier to hold the funds paid into the bank was without consideration. This claim cannot be sustained. Long ago it was decided that: "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it": *Coggs v. Bernard*, *Smith's Lead. Cas.* *97. The principle which governs the liability of a corporation for failing to perform a duty voluntarily assumed, is precisely the same as that which governs the liability of an individual in the like case: 5 *Thompson on Corporations*, sec. 6357." In such cases, as stated by Mr. Justice Grier in a leading case (*Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468, 485), "the confidence induced by undertaking to perform such a service is sufficient consideration to create a duty in the performance of it": 5 *Thompson on Corporations*, sec. 6357. The receiving of deposits by the cashier of a bank is so obviously for the purpose (among others) for which such institutions are operated, that only a passing notice need be taken of the objection that authority was wanting on the part of the cashier to receive the money paid to it. The bank received the benefit of it, of course. We think the circuit judge was right in finding that the money was received ⁴³³ by the bank under agreement to hold it, and that but for that agreement it never would have been paid to it; that it was a benefit

to the bank, and that there was authority in the cashier to receive it for the bank: See 3 Myers Federal Decisions, 77-84.

The judgment of the circuit court is affirmed.

Pope, Cary, and Jones, JJ., concur in the result.

BUILDING AND LOAN ASSOCIATIONS—LOAN TRANSACTIONS—USURY.—Transactions between building and loan associations and borrowing members are simply loans: *Meroney v. Atlanta Building etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841. These transactions contain both the elements of a loan and of a dealing with partnership funds. In some states they have been considered as partnership transactions, and upon this theory a majority of the courts in this country allow various exactions, exceeding the legal rate of interest, without denominating them usurious. Opposed to these is an array of decisions which refuse to grant such exemptions to the associations, and stamp as usurious transactions which are so in fact: See monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201. For a consideration of the law of building and loan associations see monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 150-166.

BUILDING AND LOAN ASSOCIATIONS—USURY—CONFLICT OF LAWS.—The general principles governing the validity of contracts attacked as usurious, where a conflict of laws appears as deduced from the cases in the monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201, are, that if a note or obligation was valid where it was made, and did not there conflict with any usury law, it is equally valid in any other state in which an action is brought upon it, or whenever it is otherwise sought to be enforced, though its payment was secured by a mortgage or other security upon lands situate in a state other than that of its execution; that if it offended the statute against usury in the state where it was executed and was payable, it is subject to the penalties imposed by that statute, though the action upon it is in another state, by whose laws it would not have been usurious if executed therein; that if the obligation was made in one state to be performed in another, the parties were at liberty to regard it as a contract of either state, and to stipulate for any rate of interest allowable by its laws. See, also, monographic notes to *McGarry v. Nicklin*, 55 Am. St. Rep. 50, 51; *Robertson v. Homestead Assn.*: 69 Am. Dec. 160-162.

CONTRACTS—SUFFICIENT CONSIDERATION—WHAT IS.—Any damage or suspension of right, or any liability to loss occasioned to one by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor: *Mascolo v. Montesanto*, 61 Conn. 50; 29 Am. St. Rep. 170, and note.

WAGENER v. PARROTT.

[51 SOUTH CAROLINA, 489.]

HOMESTEADS—SALE UNDER EXECUTION.—If lands of less value than the statutory limit are rightfully claimed as a homestead, a sale thereof under execution is void, unless made to obtain the purchase money therefor, or for taxes or other matters expressly enumerated by statute or constitutional provision.

HOMESTEADS—HEAD OF FAMILY.—A landowner who, together with his adopted daughter and her husband, resides on the land, forming one household, is the head of a family within the meaning of the homestead laws entitling him to a homestead exemption.

HOMESTEADS—RIGHTS OF ADOPTED CHILDREN.—An adopted child occupies the same place in the family under homestead exemption laws as a child of the blood. Each must be regarded as a member of the family while the head of the family is alive.

EJECTMENT—POSSESSION—EVIDENCE.—In an action to recover the possession of land, plaintiff's right to recover may be defeated by showing that defendant is in possession as lessee under a title not in plaintiff.

Action for the possession of land, appealed by defendant on the following grounds of error:

“1. In declining to charge, as requested by appellant, that ‘If, when the levy and sale was attempted to be made, the defendant Parrott interposed his claim of homestead, and if the sheriff proceeded to sell without regard to said claim, the sale was a nullity, as being in violation of law, and the jury should have found for the defendant.’ 2. In declining to charge, as requested by appellant, that ‘If, at the time of the levy and sale, Parrott, his adopted daughter and her husband, were living together on the land and forming one household, of which defendant, Parrott, was the recognized head, then he was entitled to a homestead exemption in the said land, and the verdict should have been for the defendant.’ 3. In declining to charge that: ‘If, under the will of Julia Parrott, the defendant, Alonzo Parrott, is entitled to the possession of the land only after certain mortgage debts are paid, and if his possession of the land when this action was commenced, and now was and is, only as tenant of the executors of his wife’s will, then this action cannot be sustained and the verdict must be for the defendant.’ 4. That his honor erred in law in charging the jury: ‘If you come to the conclusion that the plaintiff is entitled to the land, or to the interest which Parrott may have in the land, you will say, we find for the plaintiff possession of the land in dispute,’ it being submitted that as it appeared from the evidence that Parrott was neither in the possession of the land in his own right nor entitled

to the possession, plaintiffs were not entitled in this action to the verdict suggested. 5. That his honor erred in saying to the jury, in effect, that the facts testified to as to the adoption of Louise Mims by Parrott and his wife constituted no adoption in law, and did not affect the question of homestead; and that whether Louise Mims was a member of Parrott's family depended wholly on whether she was dependent in some measure upon Parrott for support, and Parrott under obligation to support her; it being respectfully submitted that, by reason of the adoption as testified to, she was legally the child of Parrott, and entitled to be regarded as a member of his family, in the sense of the homestead law, without proof of support or dependence for support. 6. That his honor should have held that the fact that his adopted daughter, Louise Mims, was living with him, constituted Parrott the head of a family, in the sense of the homestead law, and entitled him to a homestead exemption, and it was error in him not so to have held and charged. 7. That on the uncontradicted and unquestioned testimony in the case, Parrott was entitled to the homestead exemption as a necessary conclusion of law therefrom, and his honor erred in not so holding, and on this ground not granting a new trial."

Boyd & Brown, for the appellant.

Spain & Thompson, W. F. Dargan, and G. W. Dargan, for the appellee.

⁴⁹¹ POPE, J. The facts underlying the appeal, and necessary to be borne in mind in passing upon the questions raised here, are about as follows: Julia Parrott, wife of Alonzo W. Parrott, being possessed of three hundred and seventy-three acres of land and some personal property, by her will devised a tract of one hundred acres, whereon was her family residence, valued at seven hundred dollars or eight hundred dollars, to her husband, Alonzo W. Parrott, in fee simple; the balance, two hundred and seventy-three acres, she devised in equal shares to Louise Parrott, an adopted daughter, and her two nieces, Carrie May Parrott and Ellen Ruth Parrott; but upon the two hundred and seventy-three acres so devised to the said Louise, May, and Ellen Parrott, the testatrix had executed two mortgages; so the testatrix further provides in her will that her executors should have full power and authority to lease all her lands, and thereby raise a sufficient amount of money to satisfy the two mortgages. All of her personal property was bequeathed to her husband, Alonzo

W. Parrott. After the death of the testatrix, which occurred in 1893 (October), and when Mrs. Parrott ⁴⁹² died, her family had consisted for many years of her husband, Alonzo W. Parrott, herself, and their adopted daughter, Louise Parrott. This adopted daughter had been taken by the childless pair when she was five years of age, and when her name was Anne Morris. In 1885, Alonzo W. Parrott and Julia, his wife, prevailed upon the general assembly of South Carolina to pass an act whereby Anne Morris became Louise Parrott, and also became entitled to inherit as a lawful heir from both Alonzo W. Parrott and his wife, Julia Parrott, or either of them, if they died intestate. Some time in 1894 or 1895, Louise Parrott married E. B. Mims, and for awhile lived with her husband in the state of Kentucky; but in the year 1895, she and her husband returned to the home of her adopted father, where she has lived ever since. It should be stated as a fact that the executors of the will of Mrs. Julia Parrott have leased all her lands every year since her death, in order to pay the two mortgages on the two hundred and seventy--three acres of her land devised to Louise, May, and Ellen Parrott. But as to the one hundred acre tract devised to Alonzo W. Parrott, such executors have either leased to him or to E. B. Mims for him. The plaintiffs, Wagener & Co., recovered a judgment against Alonzo W. Parrott in 1893, and in 1896 the sheriff of Darlington sold all the interest of A. W. Parrott in the one hundred acres of land whereon he resided, but at this sale A. W. Parrott demanded his homestead. The plaintiffs purchased, receiving the sheriff's deed therefor. They then brought their action against Parrott for its recovery, also asking one hundred and fifty dollars damages; this latter they abandoned at the trial. When the trial came on before Judge Benet, all the foregoing facts were proved. The defendant made certain requests to the judge for his charge thereon, and these requests were refused. The circuit judge in his charge laid down certain principles of law, to which the defendant now objects. The circuit judge also refused a motion for a new trial on certain propositions of law. Whereupon the defendant appealed, ⁴⁹³ and now exhibits seven grounds of appeal. These grounds of appeal will be reported.

So far as the requests to charge are concerned, it is evident that the requests were proper. It must always be remembered that the circuit judge, in laying down certain propositions as embodying correct law, is obliged to confine himself in so doing to the case as made before him by the pleadings and evidence.

This court has held that the provision of the present constitution, which compels a circuit judge to declare the law, while its language is, "shall declare the law," means "shall declare the law applicable to the case then before him." When these requests, embodied in the first and second grounds of appeal, are considered in connection with the facts developed at the trial, it is manifest that such requests were entirely proper. This court has repeatedly held that when lands are not worth more than one thousand dollars, the sheriff has no right to levy upon and sell the same; that any sale thereof made by him is a nullity, unless for the purchase money, for taxes, et cetera, as expressly excepted in the constitution, where it creates this "exemption": *Cantrell v. Fowler*, 24 S. C. 424; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Bradford v. Buchanan*, 39 S. C. 237, and other cases. That the facts in proof show that Parrott was the head of a family, there can be no question. Louise Mims, nee Parrott, was as much the adopted child of Alonzo W. Parrott in 1896, when the land was sold, and in 1897, when the suit was brought, as she was in 1885, when the act of the general assembly was passed by which she became the adopted child of Alonzo W. Parrott and Julia, his wife; but the question of adoption will be considered directly in passing upon another ground of appeal.

The fifth ground of appeal raises the question that his honor, the circuit judge, was in error in the restrictions he placed upon the position an adopted child bears in its relation to the head of a family. It seems that the trial judge was unwilling to accord the same position in a family ⁴⁹⁴ to an adopted child as a child of the blood. Why should there arise any such difference in the law? One originates in nature and one in choice—but the same result obtains in each instance. Each is legally entitled to be regarded as a member of the family while the head of the family is alive, and each one, at the death of the head of the family, is entitled to stand as an heir. His honor, the circuit judge, seemed to be inclined, judging from the language employed by him in his charge to the jury, to require that there must be some dependence of the adopted child for its support and maintenance on the adopting parent, in order for such adopted child to be regarded as a member of a family, when a homestead was to be allowed the head of such family. But such view is not sound; in order to maintain it, it would be necessary that there should be recognized a difference, in the eye of the law, between a child born to one and a child adopted by one.

The third and fourth grounds of appeal raise the question

as to whether, in an action to recover the possession of a tract of land from another, when it is in proof that the possession of the defendant is not as owner, but as lessee, the circuit judge should have instructed the jury that they might find by their verdict that the plaintiff was entitled to possession. This was error; in all suits of the character of that at bar, the plaintiff is restricted to a verdict in strict subordination of the plaintiff's right of possession, and it is perfectly competent for a defendant to show that title to said land in controversy is in one person and the right of possession is in another person, which in neither case is that of the plaintiff. The circuit judge erred in his direction to the jury, as here complained of.

The sixth and seventh exceptions are covered by the observations already made. It follows that there must be a reversal of the judgment, and a new trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remitted to the circuit court for a new trial.

HOMESTEAD—LIABILITY TO EXECUTION SALE.—Homesteads are not subject to forced sale, either on execution or on any other final process of the court: *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516, and note. See monographic notes to *Blue v. Blue*, 87 Am. Dec. 273-282; *Mertz v. Berry*, 45 Am. St. Rep. 383-389.

HOMESTEAD—HEAD OF FAMILY—WHO IS.—It is not necessary that the relation of husband and wife, or of parent and child, should exist, in order to constitute a family having a head, within the meaning of the homestead law: *Moyer v. Drummond*, 32 S. O. 165; 17 Am. St. Rep. 850. In South Carolina, an unmarried person, it has been held, cannot constitute himself the head of a family by the adoption of another's child, and the maintenance of servants and a household: See monographic note to *Wade v. Jones*, 61 Am. Dec. 592, as to who is the head of a family.

EJECTMENT—DEFENSE OF TITLE IN OTHER THAN PLAINTIFF.—A plaintiff suing in ejectment must show title in himself, and, failing to do so, is not aided by defects in the defendant's title: *Wilson v. Leary*, 120 N. C. 90; 58 Am. St. Rep. 778; *Cox v. Arnold*, 129 Mo. 337; 50 Am. St. Rep. 450, and note. If an outstanding title is shown out of the plaintiff, he cannot recover: *Doe v. Fields*, 7 Jones, 37; 75 Am. Dec. 450.

WILSON v. COMMERCIAL UNION ASSURANCE Co.

[51 SOUTH CAROLINA, 540.]

INSURANCE—PLEADING.—A complaint for loss based upon a policy of fire insurance to which the policy is attached, and which alleges that the insured has complied with all the requirements of the policy, sufficiently alleges that he has furnished proofs of loss within the time required by the policy.

INSURANCE—PROOF OF LOSS—WAIVER.—Any disavowal by an insurance company of its liability to the insured avoids the necessity of furnishing proofs of loss as required by the policy.

INSURANCE—AGENCY—PRESUMPTION.—If an insurance company has appointed an agent to transact business for it, parties dealing with him in that business have a right to rely upon the fact of a continuance of his authority as such agent until informed in some way of its revocation.

AGENCY—AUTHORITY OF GENERAL AGENT.—Especial instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal is bound to the same extent as though such special instructions were not given.

INSURANCE—AGENCY.—A written statement in a policy of insurance acknowledging one as agent and his testimony that he has a commission from the company are sufficient to show his written appointment as an insurance agent.

INSURANCE—CONDITION OF FORFEITURE—PAROL WAIVER BY AGENT.—Although an insurance policy provides that it shall become void for failure to occupy the dwelling insured for the period of ten days, and contains a stipulation that no officer, agent, or other representative shall have the power to waive such condition, unless such waiver shall be indorsed in writing on the policy, or in some paper adhering thereto, yet a general agent of the company may waive such condition by parol, and his oral statement to the insured that the policy would not be canceled for vacancy without notice to him constitutes such waiver.

NEW TRIAL.—FINDINGS OF THE LOWER COURT on motion for a new trial as to the force and effect of the testimony are final, and cannot be reviewed on appeal.

Abney & Thomas, for the appellant.

Wilson & Wilson, and Wilcox & Wilcox, for the appellee.

541 POPE, J. The plaintiff sued the defendant to **542** recover the sum of one thousand dollars and interest after the 21st of July, 1894, by reason of the destruction by fire of a dwelling-house and the fencing surrounding it, in the town of Florence, in this state, which had been insured by defendant's policy No. 100055. There were no questions as to the terms of the policy; it was produced at the trial, and the premium had been paid. The only questions were as to a compliance by the plaintiff with the conditions of the policy relating to the dwelling-house being unoccupied beyond ten days, and as to proofs

of loss being rendered as in the policy required. The trial was had before Judge Benet and a jury. The verdict was in favor of the plaintiff. A motion for a new trial was made and refused, whereupon the defendant appeals, after entry of judgment on the verdict.

It should have been stated that, after the plaintiff has closed his testimony, a demurrer was interposed in this language: "It appears from the face of the complaint that the loss occurred on the 21st of July, 1894. It is alleged that the proofs of loss were served more than sixty days previous to the commencement of this action, and it does not allege that they were within the time designated by the terms of the policy. The policy is made a part of the complaint. It consequently does not appear that the condition precedent to bring this action, to wit, service of proofs of loss within the period the policy designates, has been complied with; the action must, therefore, fail, for the complaint in this respect is deficient." The circuit judge promptly overruled this demurrer(?). We will first pass upon this demurrer. It is true that a demurrer that the complaint fails to state facts sufficient to constitute a cause of action may be taken at any time in the circuit court; but it seems to us that a reliance upon the testimony offered at the trial to make out an alleged failure in the facts stated in the complaint is highly objectionable in passing upon the validity of the complaint, because in this way the circuit judge is called upon to pass upon the sufficiency of testimony. But, apart from this ⁵⁴³ defect in the defendant's motion for his demurrer, we think the complaint in its allegations was not defective. It ought always to be borne in mind, as was said by Chief Justice Wait, in the case of *McAllister v. Kuhn*, 96 U. S. 89: "For the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings." In the case at bar, the plaintiff alleged a compliance by himself with the conditions of the policy, and the policy itself was pleaded as a part of the complaint. One of the conditions of the policy was, that the plaintiff would notify the company and make proofs of loss within sixty days after the fire that injured or destroyed the property insured; but it has been repeatedly held in this state that any disavowal by the insurance company of its liability to the insured avoids the necessity of the proofs of loss to the insurance company: *Dial v. Valley Mut. Life Assn.*, 29 S. C. 560; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 265; *Stepp v. Na-*

tional Ins. Assn., 37 S. C. 444. It would be of no consequence, after the insurance company had, by its conduct to the assured, waived this condition, that the insured afterward sent to the insurance company proofs of loss. At most, it was but an evidence of good faith on the part of the insured. We agree with the circuit judge that this demurrer should have been overruled.

The next exceptions for our consideration are those which relate to the competency of testimony directed to the matter of the agency of Jerome P. Chase & Sons of the defendant after December 8, 1893. The policy was issued by the defendant to the plaintiff through Jerome P. Chase & Sons, at Florence, South Carolina, in May, 1893, covering a period of three years after the date of its delivery. The defendant admits these facts, but contends that such agency of Jerome P. Chase & Sons was terminated on the eighth day of December, 1893; but it is nowhere contended that either the public generally had any notice of the termination ⁵⁴⁴ of such agency, or that the plaintiff or his agent had any such notice. So, therefore, when John Wilson, who was agent of the plaintiff at Florence, South Carolina, sought to testify that he had no such notice until after the 21st of August, 1894; not only so, but that when he applied to Lawson Chase, who was a member of the firm of Jerome P. Chase & Sons, for permission to leave the house vacant from about the 28th of May, 1894, the said Lawson Chase said: "We [meaning the firm of Chase & Sons] will not cancel this policy without giving you notice," and that no such notice was given; and that Seaborn Chase, who was also a member of the firm of Chase & Sons, when the witness, John Wilson, as the agent of the plaintiff, notified him of the loss by fire of the building and fencing insured, did not disclose to the said John Wilson that the agency of Chase & Sons for the defendant had ceased; and that the said Seaborn Chase, when he reported to John Wilson, as agent for the plaintiff, that the defendant would not pay the loss, did not notify him that the agency of Chase & Sons for the defendant had ceased; the defendant objected to such testimony being admitted, but the circuit judge overruled such objection. The court decides upon the competency of testimony, but the jury alone must pass upon its sufficiency. When the plaintiff proved, and the defendant admitted, that Jerome P. Chase & Sons were the agents of the defendant, and as such dealt with the plaintiff in relation to the issuing of the policy, there was clearly established an agency by said firm with the defendant. Now, when did that agency cease, so far as the plaintiff was concerned?

Was it in the power of the defendant to quietly and secretly withdraw its agency from Chase & Sons, so as to prejudice the rights of third parties to whom this revocation of agency was utterly unknown, and especially when members of this firm of Chase & Sons still acted to the agent of plaintiff as if they were still clothed with this agency? We do not think so. As was well said by the United States supreme court, in *Insurance Co. v. McCain*, 96 U. S. 86: "No company ⁵⁴⁵ can be allowed to hold out another as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon a continuance of his authority, until in some way informed of its revocation. The authorities to this effect are numerous, and will be found cited in the treatises of Paley and Story on Agency. The law is equally plain that especial instruction limiting the authority of a general agent, whose powers would be otherwise coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him: Story on Agency, secs. 126, 127, and cases there cited." In the case at bar, there was no proof that Chase & Sons were not the general agents of the defendant. Such firm was commissioned by the defendant; such firm issued the policy as agents of the defendant. By the testimony, such firm gave assurances to the plaintiff's agent, which presupposed the continuance of such agency, and never denied agency until the 21st of August, 1894—about one month after the property had been destroyed by fire, and after such firm had received notice of the fire and had communicated to the plaintiff's agent that the defendant refused to pay the loss. Certainly, one of the parties must suffer by the injury done by these agents, Chase & Sons. Should not this loss be borne by the party who made Chase & Sons its agent? It seems so to us. Hence we agree that the circuit judge committed no error in ruling that the testimony in question was competent.

The next exceptions relate to that part of the circuit judge's charge in which he submitted the question of the existence of the agency of Chase & Sons for the defendant to the jury. Virtually, he told the jury, that if they found ⁵⁴⁶ as a fact that

Chase & Sons were the agents of the defendant, such defendant would be bound by the acts and declarations of the agents within the scope of their authority. For the reasons assigned, and the authorities cited in the consideration of the matter just preceding these exceptions, we think the circuit judge committed no error here.

The next exceptions relate to a question which has evoked most anxious consideration; it is this: Where the parties to a contract have inserted in the paper evidencing such contract stipulations that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be subjects of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or to be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached," can it be held that a waiver of such stipulations or conditions could not be made by Chase & Sons as agents of the defendant without the same was in writing? The two stipulations referred to were that: "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company . . . and within sixty days after the fire, unless such time is extended in writing by this company, et cetera"; and also, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." Another provision of this policy is as follows: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." Thus, by the last quotation from the policy, it is manifest that it is a part of the contract of insurance between the plaintiff and defendant ⁵⁴⁷ that no person shall act as agent in any matter relating to the insurance unless such appointment is evidenced by writing. Were Jerome P. Chase & Sons agents of the defendant under appointment in writing? The answer to this question is twofold. In the first place, at two places in the contract, which is in writing, this firm is recognized as agents of the defendant. In the second place, Mr. Seaborn Chase, a witness for the defendant, in his testimony, states that his firm bore a

commission from the defendant. A commission is described as "the instrument or certificate of an officer's appointment." We must hold, therefore, that Jerome P. Chase & Sons were the duly appointed agents of the defendant insurance company. We are now prepared to consider the stipulations in question. As to the notice and proofs of loss by fire, we may remark that in the contract itself a distinction is preserved between this stipulation and that pertaining to the failure to occupy the insured building for ten days; for, in the former, it is only a stipulation without any penalty, while in the latter it renders the policy void. We have, in a measure, already disposed of the first stipulation; it cannot be sustained in view of the testimony in the cause, for the insured did give notice to the defendant's agent immediately after the fire, and soon thereafter such agent informed the insured that his principal denied all liability under the policy. By this last course the defendant was not entitled to the proofs of loss within sixty days after the fire.

Now, as to the failure to occupy the dwelling-house insured for the period of ten days. As before remarked, the contract provides that in this event the policy shall be void. This is a forfeiture. No court will allow a forfeiture, if it can be avoided in justice. As was remarked by Mr. Justice Bradley, in *Insurance Co. v. Norton*, 96 U. S. 242: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And when adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture ⁵⁴⁸ upon such compensation being made." Great stress is laid upon the fact that this stipulation is in the contract, and that, by the terms of the contract, it was declared that no officer, agent, or other representative shall have the power to waive this condition, unless the same shall be indorsed in writing upon the policy, or in a paper adhering to the policy. Grant that this is true, yet, after all, this policy is but a contract. Parties to a contract may change its terms. When it is remembered that the acts of an agent are the acts of his principal in all matters within the scope of the agency; that Jerome P. Chase & Sons were held out as the agents of the defendant in the policy itself, and also in the commission issued to such firm by the defendant, and that, by the testimony, the agents of the defendant assured the plaintiff that the policy of insurance would not be canceled without giving the insured due notice thereof, and that no such notice was ever given, does it not seem, under all these circumstances, that the plaintiff is now entitled to have

this court say that the parties to the original contract have agreed that the terms of the original contract of insurance, in this particular, have been changed? The earlier decisions were much stricter than the more recent. It ought to have been mentioned that, although the plaintiff paid in cash the premium of insurance covering three years from the 31st of May, 1893, and that, although not quite fourteen months covered thereby had expired, when the fire destroyed the property insured, and, although the defendant denies all liability under its policy, it has never offered to pay back to the plaintiff that part of the premium it confessedly has not earned. We will not pursue the authorities bearing upon this point. Some of them are *Insurance Co. v. Norton*, 96 U. S. 242; *Berry v. American etc. Ins. Co.*, 28 Am. St. Rep. 554; *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 233.

The defendant appellant also insists in his exceptions that he was prejudiced by some observations of the circuit judge, in his charge to the jury, to the effect that an insured was not bound by all the many stipulations of the contract of insurance ⁵⁴⁰ where the same were immaterial, without explaining to the jury what were material stipulations. When the charge is scrutinized, it is manifest that the circuit judge met fairly and squarely those stipulations and conditions in the policy that made up the issues in this case. Beyond this the circuit judge ought not to have gone, and as to those immaterial stipulations and conditions in the policy, they occupied no place in this contention; and, therefore, if the circuit judge erred, it was in matters which did not prejudice the defendant. It follows, therefore, that the exceptions must be overruled.

So far as the exceptions relating to a new trial are concerned, they cannot be sustained; for, when they relate to the force and effect of the testimony, the circuit judge alone is invested with power to pass upon its weight, and so far as the points of law are concerned we agree with the circuit judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Gary, J., concurs in the result.

MR. CHIEF JUSTICE McIVER dissented, upon the ground that the plaintiff had been allowed to introduce parol evidence tending to show a parol waiver by an alleged agent of the conditions of the contract upon which he based his action, in direct violation of one of the express stipulations of the contract, when there was no testi-

mony whatever even tending to show that the defendant company had, in any way, authorized any agent to make such waiver in any other manner than that expressly prescribed by the terms of the contract.

INSURANCE—ACTION ON POLICY—COMPLAINT.—A complaint on a policy of insurance states a cause of action where it alleges that the property insured was the property of the plaintiff at the time of the issuance of the policy; that it was on his premises when it was destroyed by fire; that he was damaged to the value of the property; and that he had performed all the terms of the contract on his part: *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393; *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

INSURANCE—WAIVER OF PROOFS OF LOSS.—A denial of liability by the general agent of an insurance company, when notified of a loss, constitutes a waiver, and obviates the necessity of furnishing proofs of loss: *Continental Ins. Co. v. Chew*, 11 Ind. App. 330; 54 Am. St. Rep. 506, and note; *Faust v. American Fire Ins. Co.*, 91 Wis. 158; 51 Am. St. Rep. 876, and note; *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 595, and note.

INSURANCE COMPANIES—AUTHORITY OF AGENT—HOW DETERMINED.—Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant: *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350, and note; *Brown v. Franklin Mut. Fire Ins. Co.*, 165 Mass. 565; 52 Am. St. Rep. 534. An insurance company may limit or restrict the powers of its agent, and when such restrictions are known to the person dealing with such agent, the company is bound only by acts of the agent within the scope of the authority conferred: *German Ins. Co. v. Heiduk*, 30 Neb. 288; 27 Am. St. Rep. 402, and note. His powers cannot be limited by instructions not communicated to the insured: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

INSURANCE COMPANIES—POWER OF AGENTS TO WAIVE CONDITIONS.—An insurance agent, furnished by his principal with blank applications and with policies, duly signed by the company's officers, and who has been authorized to take risks, to issue policies by simply signing his name, to collect premiums, and to cancel policies without consulting his principal, is empowered to waive conditions of forfeiture in such policies for encumbrances placed on the insured property. He may waive such forfeitures by parol, notwithstanding the limitations upon his power, contained in the policy: *German American Ins. Co. v. Humphrey*, 62 Ark. 349; 54 Am. St. Rep. 297, and note. A waiver of proofs of loss under like conditions was held conclusive upon the company in *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; 33 Am. St. Rep. 360, and note; likewise where the condition was as to unconditional and sole ownership: *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note. For important limitations upon the above doctrine, see *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733; *Taylor v. State Ins. Co.*, 98 Iowa, 521; 60 Am. St. Rep. 210; *German Ins. Co. v. Heiduk*, 30 Neb. 288; 27 Am. St. Rep. 402, and notes thereto.

CASES
IN THE
SUPREME COURT
OF
VIRGINIA.

REID v. NORFOLK CITY RAILWAY COMPANY.

[94 VIRGINIA, 117.]

STREETS AND HIGHWAYS—ADDITIONAL SERVITUDES.—The conversion of a single track horse-car railway into a double track electric railway is not the imposition of an additional servitude upon a street, for which abutting property-owners are entitled to compensation, or which may be enjoined at their instance.

STREETS AND HIGHWAYS—AN ADDITIONAL SERVITUDE OR BURDEN FOR WHICH PROPERTY-OWNERS ARE ENTITLED TO COMPENSATION is not created by the construction and operation of an electric railway upon a city street.

Harmanson, Heath & Heath, for the appellants.

White & Garnett, for the appellees.

118 **CARDWELL, J.** The Norfolk City Railroad Company had for many years prior to the institution of this suit occupied that part of Church street in the city of Norfolk lying north of Charlotte street with its single track horse-car railway, and had for a long time prior occupied that part of Church street south of Charlotte street with its double track horse-car railway. By an amendment of its charter, approved December 19, 1889 (Acts 1889-90, p. 36), it was permitted to substitute "cable, electricity, or other motive power," and to construct a single or double track railroad up Church street to the Fair Grounds in Norfolk county, and also along and over certain other streets mentioned in the act of assembly, provided that before the work of construction should be commenced in the city of Norfolk the consent of the council of the city should be first obtained. The consent of the council of the city of Norfolk was obtained by an ordinance

adopted February 14, 1893, the seventh section of which reads as follows: "That said company shall use such cars as will best subserve the convenience of the people, and may move the same by horses, mules, or electricity, as it may be proper; and, if electricity be used, permission is hereby given to erect and maintain the necessary poles and wires; provided, that existing poles shall be used wherever practicable, the work to be done under the supervision of the street, sewer, and drain commissioners, or such other agent or agents as the council may select." The ordinance, among other things, required the railroad company, within six months from its adoption, to commence, and, within eighteen months from that date, to complete, "the equipment of its road with electric cars of the most approved plans," and to extend its double track on Church street (then operated south of Charlotte street) to the city limits. For the faithful performance of its duties under this ordinance extending its franchises, the railroad company was ¹¹⁹ required thereby to enter into a bond in the penalty of ten thousand dollars.

The bond was duly executed, and, in strict conformity with its charter and the ordinance of February 14, 1893, the railroad company was proceeding to construct a double track railroad, to be operated by electricity as its motive power, along Church street north of Charlotte street, and to this end some of the poles, upon which wires were to be strung to be used for the propulsion of its cars, had been erected along Church street adjacent to the sidewalks, and other work done, when the appellants (complainants in the court below), styling themselves owners or occupiers of certain lots of land with buildings thereon, fronting on Church street, north of Charlotte street, in the city of Norfolk, presented their bill of complaint on behalf of themselves and all other persons, residing or owning land fronting or abutting on Church street north of Charlotte street, to the judge of the corporation court of the city of Portsmouth, and obtained an injunction restraining the defendants, their agents, et cetera, from digging holes and planting poles in front of complainants' property, and the property of other persons similarly situated, abutting on Church street in the city of Norfolk, and from laying down a double track along that portion of Church street north of Charlotte street, until the further order of the court.

The circuit court of Norfolk city, upon a motion to dissolve the injunction, heard upon the bill, the demurrer and answer of the defendant railroad company, and the affidavits filed by the complainants and defendant company, dissolved the injunction

and dismissed the bill, because, in the opinion of the court, it was without equity. From this decree an appeal and supersedeas was awarded by one of the judges of this court. The refusal of the court below to allow the complainants to amend their bill is assigned as error.

While the decree dismissing the bill for want of equity sets ¹²⁰ out that the complainants asked leave to amend, which the court refused, it does not disclose in what respect or in what particular they proposed to amend their bill, and hence this court is not advised as to whether or not it was error in the court below to refuse the complainants the right to amend. Aside from this, it appears that if this court were to hold that the court below so erred, it would be unavailing to the complainants. Their bill was a pure bill of injunction, and the injunction order merely restrained the defendants "from digging holes and planting poles in front of complainants' property, and the property of other persons similarly situated; . . . and also from laying down a double track along that portion of Church street north of Charlotte street." It did not contain a mandatory provision requiring the railroad company to remove any poles which had already been planted, or to fill up any holes which had been already dug, or to remove any track which had been already laid.

It further appears that the decree appealed from was suspended for thirty-three days to allow complainants to apply for a supersedeas, conditioned upon their executing a suspending bond in the penalty of ten thousand dollars, which they did not avail themselves of, but on the 5th of November, 1894, secured from one of the judges of this court an appeal and supersedeas, a bond being required only in the penalty of two hundred dollars; whereupon the defendant railroad company, at the earliest opportunity, which was the first day of the November term, 1894, moved this court to dismiss the appeal for failure to give a proper bond, as required by sections 3470 and 3471 of the code; but instead of dismissing the appeal, this court, on the 9th of November, 1894, on the motion of appellants, made an order modifying its order allowing the appeal and supersedeas so as to allow an appeal only, not to operate as a supersedeas to, or in any manner hinder or delay the execution of, the decree appealed from. It is now conceded that all the work proposed by the defendant railroad company, which ¹²¹ appellants sought to enjoin and to prevent, has been legally completed under the proceedings had in the cause; all necessary poles have been planted, wires strung, the double track laid, and cars in operation on

Church street, north of Charlotte street. While the affidavits read in support of the bill upon a motion to dissolve the injunction in the court below are to the effect that Church street north of Charlotte street was too narrow to permit a double track electric street railway thereon without destroying the street for business purposes, and damaging the property abutting thereon, although no such allegation is made in the bill, it is shown here also, and not controverted, that the street has been widened under an ordinance of the city council of Norfolk, whereby this objection has been removed.

Therefore, in any view that may now be taken of the case, the only question presented to this court is, whether or not the construction and operation of an electric street railway upon a street of a city is an additional servitude or burden thereon, for which the abutting lotowners are entitled to compensation.

Whether or not appellants, as "owners or occupiers" of the property abutting on Charlotte street, could properly unite their claims in one suit for the sole purpose of enjoining and restraining the work of construction till such compensation is paid, we deem it unnecessary to decide.

Counsel for appellants concede that a horse-car railway is not an additional servitude upon a street, and that the weight of authority is against the proposition that electric railways are, but rely upon the Virginia cases of *Hodges v. Seaboard etc. R. R. Co.*, 88 Va. 653, and *Western Union Tel. Co. v. Williams*, 86 Va. 706, 19 Am. St. Rep. 908, to sustain their contention that the conversion of a single track horse-car street railway into a double track electric street railway is, in this case, the imposition of an additional servitude on Church street, north of Charlotte street in the city of Norfolk, which entitles appellants to compensation. ¹²²

The case of *Hodges v. Seaboard etc. R. R. Co.*, 88 Va. 653, involved the question whether or not the occupation of a street by a steam railroad company was the imposition of an additional burden or servitude upon the street, for which the abutting owners were entitled to compensation, and the court held that it was. In the case of *Western Union Tel. Co. v. Williams*, 86 Va. 706, 19 Am. St. Rep. 908, the question was whether the erection of a telegraph line upon a county road is an additional servitude, and the court held that it was. Both decisions, it may be said, are in harmony with the vast majority of decisions in this country, and are founded on the well-recognized distinction between those uses of streets and highways which are not promotive of the

original purposes for which streets and highways are dedicated or occupied, and those uses which are promotive of such original purposes.

A very different principle applies in connection with the operation of street-car lines in public streets from that applied to private corporations diverting the public street or highway from its usual and appropriate use to an essentially different use, and for the purpose of private gain.

In *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246, the supreme court of Pennsylvania held that the occupying of a county road by a pipe line, imposed an additional servitude upon the land of the farmowner, while in the case of *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, it held that a pipe line, laid within the limits of the street by authority of the city, did not impose any additional servitude on the land of the lot owners.

In the case of *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 363, 1 Am. St. Rep. 316, the supreme court of Maine held that when land has been lawfully taken for a street, legislative and municipal authority may authorize the construction and operation of a street railway upon it, no matter what the motor, without providing for additional compensation ¹²³ to the landowner. The opinion by Emory, J., says: "The laying down of rails in the street, and the running of street-cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but is not a change in the use. The land is still used for a highway. The weight of authority is so manifestly in favor of this proposition it is unnecessary to cite particular decisions."

"The use of electricity as a motive power for street-cars causes no greater obstruction to the streets, and imposes no greater burden upon them than the ordinary horse railway, with the single exception of the posts and wires. But when the posts are placed at the side of the railway, and the wires sufficiently high to permit a free use of the street, they are not a material obstruction to travel, or a use of the street inconsistent with the purposes of its dedication. The electric-car does not occupy as much space upon the street as the cars with horses attached. Comparing the electric-car with the horse-car, the former is not more noisy, is cleaner, is started and stopped quicker, moves faster, is more readily controlled, and, by its more rapid carriage of passengers, relieves the street, to some extent at least, of the

general burden of travel. . . . After a full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude, and that the use of this motive power, when duly authorized, does not entitle abutting owners to compensation": Booth on Street Railways, sec. 83. In support of this proposition the author cites numerous decisions by the courts of last resort in the states of Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Rhode Island, and Utah. To which may be added Georgia, North Carolina, and Texas.

¹²⁴ After reviewing the decided cases down to a later date, Keasby, in his work "On Electric Wires," section 15, says: "It would seem very clear that the use of electricity instead of horses to propel street-cars used for the same purposes as horse-cars does not change the use of the street. The cars are of the same kind; they are used in the same way for taking people from door to door, and facilitate travel in and about the city."

In the case of *Halsey v. Rapid Transit etc. Ry. Co.*, 47 N. J. Eq. 380, Vice-Chancellor Van Fleet, in discussing the use of poles and wires in the operation of a city railway by electricity, says: "They form a part of the means by which a new power to be used in the place of animal power is to be supplied for the propulsion of street-cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. . . . The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden upon the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessions to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street-cars, and the right of the public to use the streets by means of street-cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem, then, to be entirely certain that the occupation of the street by poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement is acquired."

The test applied in all the cases we have been able to examine is whether or not the proposed use of the street can be said to be

in pursuance of the original purposes contemplated ¹²⁵ in laying it out as a highway. Hence it was said by Gaines, C. J., supreme court of Texas, in *San Antonio etc. Ry. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730: "A street may be older than the omnibus or the hansom cab, and yet who would deny the right of the drivers of such conveyances the use of it?"

In that case it was held that the proper construction and operation of an electric railway on a street where there were already two other such railways, and so near an abutting store building as to inconvenience the occupants in receiving and delivering goods, is not such an infringement on the right of access to such building as to entitle the owner thereof to damages based on the consequent depreciation of the value of the property; and that the principle is that the original purposes for which the street was dedicated embrace the operations of a street railway, and that if the owner of the adjacent property suffer a loss by reason of such operation, it is *damnum absque injuria*.

The authorities, both the adjudicated cases and text-writers, so far as we have been able to examine them, overwhelmingly maintain that, so long as a street is used or proposed to be used under legislative and municipal authority for purposes only for which it may be reasonably said to have been dedicated or acquired, its use, or proposed use, cannot be enjoined, as such use adds no additional servitude or burden to the land for which the abutting owners are entitled to compensation.

Accordingly it was held by this court in *Home Bldg. etc. Co. v. Roanoke*, 91 Va. 52, that: "The building of an approach to an elevated bridge in the streets of a city, leaving a space of about seven and one-half feet on each side, for the convenience of the public or adjacent owners, when there is no actual encroachment on the property of the abutting landowner, does not create any additional servitude on the land, and is not a 'taking' of private property, within the meaning of article 5, section 14, of the constitution ¹²⁶ of Virginia, though the use of the property may be thus impaired. The resulting damage, if any, is *damnum absque injuria*. And it is immaterial whether the fee in the street is in the city, the state, or the abutting landowner."

We do not, however, mean to say that a street railway may not be so constructed and operated as to create a new servitude upon the street or burden upon the land, or cause injury to property rights, which would entitle the abutting owners to compensation, or to damages for the injury, but such a case is not made by appellants' bill.

Being of opinion, therefore, that the construction and operation, under legislative and municipal authority, of an electric street railway is not an additional servitude upon a street, for which the abutting lotowners are entitled to compensation, and that a fortiori the conversion of an existing single track horse-car railway into a double track electric railway is not, the decree of the court below dismissing the bill of appellants is affirmed.

STREET RAILWAYS—NOT ADDITIONAL SERVITUDE.—The authorized use of a public street for street railway purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting landowners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note; *Chicago etc. Ry. Co. v. Street Ry. Co.*, 139 Ind. 297; 47 Am. St. Rep. 264, and extended note; *San Antonio etc. Ry. Co. v. Limburger*, 88 Tex. 79; 53 Am. St. Rep. 730, and note. It is otherwise as to a commercial street railway: *Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 95 Wis. 561; 60 Am. St. Rep. 136, and note.

UNION CENTRAL LIFE INSURANCE CO. v. POLLARD.

[94 VIRGINIA, 146.]

CONFLICT OF LAWS—PLACE OF CONTRACT—AGREEMENT FIXING.—Where a contract is entered into between persons residing in different states, they may, by a stipulation in a contract, provide that it shall be considered to be made in one of those states, and when they have done so, the laws of that state control its validity, nature, interpretation, and effect.

THE LAWS OF ANOTHER STATE ARE FACTS of which the court does not take judicial notice, and which, therefore, must be proved.

INSURANCE—STATUTES AS A PART OF CONTRACT OF. The statutes of a state in which a contract of insurance is made are as much a part of it as if incorporated in it.

MOTIONS—THE LAWS OF ANOTHER STATE WHICH ARE RELIED UPON BY A MOVING PARTY need not be pleaded nor referred to in the notice of the motion. It is sufficient that the notice of the motion is such that the defendant cannot mistake its object. If he desires more specific information, his remedy is to move the court to order the plaintiff to file a statement of the particulars of his claim.

LAWS OF ANOTHER STATE—HOW PROVED.—The revised statutes of another state are admissible in evidence for the purpose of proving its laws, and, when one or more sections are perfect as to their sense and purpose, there is no necessity of introducing the whole of the statute upon a general subject, of which the section offered is a part.

LAWS OF ANOTHER STATE.—THE INTERPRETATION AND EFFECT OF A STATUTE OF ANOTHER STATE, which has been offered in evidence, are for the court alone.

CONFLICT OF LAWS—RULES OF EVIDENCE.—Rules of evidence are governed by the laws of the country where the court sits. A statute providing that no portion of an answer to any interrogatory made by an applicant for a policy of insurance shall be used except under certain circumstances may be disregarded in an action upon a policy tried in another state.

EVIDENCE—ENTRIES IN FAMILY BIBLE NOT MADE BY MEMBER OF THE FAMILY.—The admissibility of an entry in a family Bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family Bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence.

INSURANCE—DECLARATIONS OF THE INSURED AS EVIDENCE AGAINST THE BENEFICIARY.—Declarations made by the insured respecting his age in an application for a previously issued policy of insurance are not admissible against his beneficiary to prove the facts stated in it. But these facts, being otherwise proved, such declarations are admissible for the purpose of proving that he had knowledge of the matters so stated, and that his subsequent statements to the contrary were fraudulent.

APPELLATE PROCEDURE—ERROR MUST BE SHOWN.—Bills of exception to the admission or rejection of evidence by the trial court must show whether it was material; otherwise the judgment will not be reversed.

Motion on behalf of Dollie E. Pollard, beneficiary in a policy of insurance issued upon the life of Augustus M. Broach. The insurance company demurred on the ground that the assured fraudulently represented himself to be one year younger than he in truth was, and that, being diseased, he failed to disclose that fact. In his application for the policy in suit and for three others, the assured stated the date of his birth to be May 8, 1839. In a previous application for another policy, he gave the date of his birth as May 8, 1838, and this was the date stated in the family Bible. The court instructed the jury that if the answers made by the assured in his application were made in good faith and substantially true and free from any attempt to defraud the insurer, the verdict should be in favor of the plaintiff, but, if the jury believed the answers in the application to have been willfully false or fraudulent, the verdict should be for the defendant. Verdict for the plaintiff, and the defendant appealed.

Christian & Christian and Ramsey, Maxwell & Ramsey, for the plaintiff in error.

George P. Haw and Pegram & Stringfellow, for the defendant in error.

151 BUCHANAN, J. Section 3211 of the code authorizes a party entitled to recover money from a life insurance company on a policy of insurance to proceed against it by motion upon

notice: *Morotock Ins. Co. v. Pankey*, 91 Va. 259; *Long v. Pence*, 93 Va. 584.

The policy of insurance provided that "it was issued and accepted upon the further conditions and agreements contained on the following page, which are made a part of this contract and which contract shall be held and construed to have been made in the city of Cincinnati, Ohio."

The defendant company was an Ohio corporation, doing business in this state where the insured lived, and where the application was made. But for the express provision in contract of insurance that it should be "held and construed to have been made in the city of Cincinnati, Ohio," there might be some ground for holding that it was a Virginia contract.

Where, however, the parties to the contract have themselves expressly declared that their contract shall be held and construed as made with reference to a certain jurisdiction, that shows by what law they intended the transaction to be governed. And, as said by Phillimore (4 Phillimore's International Law. 469): "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves." "In every forum," said Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1, 48, "a contract is governed by the law with reference to which it is made."

There is no room for inference or presumption as to ¹⁵² what that intention was when it is expressed in the contract: *Pritchard v. Norton*, 106 U. S. 124.

The contract of insurance having been made with reference to the laws of the state of Ohio, the plaintiff had the right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation, and effect: *Freeman's Bank v. Ruckman*, 16 Gratt. 126, 127; *Corbin v. Planters Nat. Bank*, 87 Va. 665; 24 Am. St. Rep. 673; 3 *Minor's Institutes*, 145; *Story on Conflict of Laws*, secs. 263, 280.

In order to rely upon the laws of that state it was necessary to prove them, as the court could not take judicial notice of the laws of another state. They are facts of which courts and juries must be informed as of other facts.

The plaintiff offered in evidence the following sections of the Revised Statutes of Ohio (1880) over the defendant's objection:

"Sec. 3625. No answer to any interrogatory made by an appli-

cant in his or her application for a policy shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued, and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer: 75 Ohio Laws, sec. 18, p. 572.

"Sec. 3627. All companies organized under any laws of this state shall continue corporations for the purpose for which they were chartered, but subject to all the provisions, requirements, and penalties imposed on companies organized under this chapter, and entitled to all the benefits and privileges of this chapter:" 69 Ohio Laws, sec. 20, p. 150.

The object of that statute, and statutes of like character which have been enacted in many of the states, was to prevent insurance companies from escaping liability upon their contracts upon mere technical grounds which do not affect the merits of the case. It abolished the common-law rule that the warranty of the truth of the answer to a specific interrogatory ¹⁵³ in an application for a policy implied that the subject matter of the question and the answer is material, and that such answer so warranted, if not true, renders the policy void, whether it was made in good faith or not. It provides that no answer in such an application shall bar the right of recovery on the policy unless it was willfully false, fraudulently made, material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued, and that neither the agent nor company had any knowledge of the falsity or fraud of such answer. It is a statutory rule for the regulation of contracts of insurance, which prescribes their scope and effect, and determines the duties and obligations of contracting parties. It is therefore as much a part of every contract of life insurance governed by the laws of the state of Ohio, and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and that no waiver of the parties nor stipulations in the contract can change the law: *Hermany v. Fidelity etc. Life Assn.*, 151 Pa. St. 17; *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172; *Insurance Co. v. Leslie*, 47 Ohio St. 409; *White v. Providence Sav. Life etc. Soc.*, 163 Mass. 108.

It is insisted that in order to introduce in evidence the laws of

the state, they must have been relied upon in the plaintiff's pleading.

The proceeding in the case, as we have seen, was by motion upon notice. The rule governing notices is that they are presumed to be the act of the parties, and not of lawyers, and are viewed with great indulgence by the courts. If the notice be such that the defendant cannot mistake its object, it will be sufficient: *Supervisors v. Dunn*, 27 Gratt. 608.

If the defendant desires to have a more specific information of the plaintiff's claim than is contained in the notice, he has the right to move the court to order the plaintiff to file a ¹⁵⁴ statement of the particulars of his claim. If the court makes such order, and the plaintiff fails to comply with it, the court may exclude evidence of any matter not so plainly described in the notice as to give the defendant information of its character: Code, sec. 3249. No such motion was made in this case.

If the defendant was surprised by the introduction of the laws of the state of Ohio, assuming that it was necessary to plead them in a case where there are formal pleadings, it was because it failed to avail itself of the provision of section 3249.

It is also contended that those laws were not properly proven, even if they were admissible. The usual and better, if not the only, manner of proving the laws of a foreign state, when they are statutory, is by introducing in evidence a properly authenticated copy of the statute, or so much of it as is necessary to show what the foreign law is upon the particular point or points in controversy.

In the case of *Hunter v. Fulcher*, 5 Rand. 126, 131, 16 Am. Dec. 738, one section only of a statute of the state of Maryland was introduced in evidence. This court held that the section offered was perfect as to the sense and purpose (as are the sections relied on in this case), and that there was no necessity for introducing the whole of that statute upon the general subject of which the section offered was a part.

When the evidence of the law of another state is shown by a copy of a statute, or a part of it, as was done in this case, the question of its interpretation and effect was for the court alone, as in the case of other evidence which consists entirely of writings or documents: *Ennis v. Smith*, 14 How. 400; *Kline v. Baker*, 99 Mass. 255.

It is true that a portion of the statute in question provided that no answer to any interrogatory made by an applicant for a

policy of insurance shall be used in evidence except under certain circumstances.

¹⁵⁵ The admission of evidence and the rules of evidence are matters of procedure rather than matters touching the rights of the parties under their contracts, and are generally to be governed by the law of the country where the court sits. That portion of the statute does not affect either the validity, nature, or interpretation of the contract, but applies alone to the remedy; and in the enforcement of the contract in this state will not be regarded, but our mode of procedure will be followed: *Fant v. Miller*, 17 Gratt. 47; *Corbin v. Planters Nat. Bank*, 87 Va. 661; 24 Am. St. Rep. 673; *Story on Conflict of Laws*, 8th ed., sec. 634a.

The defendant, in making its defense, sought to show that one or more of the material statements made by the insured in his application were false and fraudulent. To do this it offered in evidence the family Bible of the insured, and read to the jury an entry which tended to prove that he was born on the eighth day of May, 1838, instead of May 8, 1839, as stated in his application for the policy sued on. Although it appeared that the entry read to the jury as to the date of his birth was made by a person who was not a member of his family, it was admissible evidence, and tended to prove the date of the birth of the insured. The admissibility of an entry in a family Bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family Bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence. The reason why it is admissible, although the handwriting be unknown or made by others than the family, is simply because the Bible being in the family, where all have access to it, the presumption is that the entry would not be permitted to remain if the whole family did not adopt it, and thereby give authenticity to it: *Monkton v. Attorney General*, 2 Russ. & M. 162, 163; *Hubbard v. Lees*, 1 L. R. Exch. 255, 258; 1 *Taylor on Evidence*, sec. 650; 1 *Greenleaf on Evidence*, secs. 104, 105.

¹⁵⁶ After this evidence had been introduced, the defendant offered the application of the insured for a policy of insurance in another company made several years prior to his application for the policy sued on, in which he stated that he was born on the eighth day of May, 1838. This evidence upon the objection of the plaintiff was excluded. This is assigned as error.

The policy sued on having been taken out for the benefit of another by the insured, his declarations in the first application

were not admissible against the beneficiary, to prove the facts stated in it: *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 421; *Swift v. Massachusetts Life Assn.*, 63 N. Y. 186; 20 Am. Rep. 522. It was important, however, for the defendant to show that the insured had knowledge of his age in order to show that his answer as to his age in the latter application for insurance was false or fraudulent. Competent evidence having been offered tending to show his age, his declarations in the former application for insurance were competent to show that he had such knowledge. The court erred, therefore, in not allowing the former application for insurance to go to the jury.

Other exceptions were taken to the action of the court in excluding evidence of the declarations of the insured as to his health and habits, but as the judgment of the circuit court will have to be reversed for refusing to allow the insured's former application for insurance to go to the jury, it is unnecessary to consider them, further than to say that the declarations of the insured were not competent evidence to prove the existence of facts showing false statements in his application, i. e., as that he had a disease denied in the application for insurance. But where such facts are otherwise proved, or there is evidence tending to prove them, the declarations of the insured are competent for the purpose of showing that the insured had knowledge thereof.

It does not appear from some of the bills of exceptions ¹⁵⁷ whether the evidence rejected by the court was material or not.

In order to show that the trial court erred in rejecting an offer of evidence, or in excluding evidence, the bills of exceptions must show the materiality of the evidence tendered. Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him. If the witness is permitted to answer, and the answer is excluded, it should show what the answer was. This is necessary because it may be that the witness had no knowledge upon the subject, or what he knew was irrelevant or immaterial. A judgment will not be reversed because evidence has been excluded or rejected by the trial court unless its materiality is made to appear: *Carpenter v. Utz*, 4 Gratt. 272; *Johnson v. Jennings*, 10 Gratt. 1; 60 Am. Dec. 323; *McDowell v. Crawford*, 11 Gratt. 387; *Martz v. Martz*, 25 Gratt. 367; *Stoneman v. Commonwealth*, 25 Gratt. 887; *Continental Ins. Co. v. Kasey*, 25 Gratt. 276; 18 Am. Rep. 681; *Beirne v. Rosser*, 26 Gratt. 537, 547; *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 421; *Taylor v. Commonwealth*, 90 Va. 110.

The court properly refused to give the five instructions asked for by the defendant. They were all based upon the erroneous theory that the policy of insurance was not made with reference to, and was not to be interpreted by, the laws of the state of Ohio.

There was no error in the action of the court to the prejudice of the defendant in giving the instruction asked for by the plaintiff as amended.

As the case will have to be remanded for a new trial, it is unnecessary to consider the assignment of error that the verdict is contrary to the evidence.

The judgment will be reversed, the verdict set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

EVIDENCE—JUDICIAL NOTICE—STATUTES OF OTHER STATES.—Statutes of another state must be pleaded and proved as any other fact. The courts will not take judicial notice of them: *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note; nor of their interpretation by the courts of their state: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414, and note. Such laws must be proved, and, if they are written, the laws themselves, or authenticated copies, must be produced: *Robertson v. Staed*, 135 Mo. 135; 58 Am. St. Rep. 569, and note. See *Goodwin v. Provident Savings Life etc. Assn.*, 97 Iowa, 226; 59 Am. St. Rep. 411.

CONTRACTS—FIXING PLACE OF, BY AGREEMENT.—Where the parties to a contract reside in different states or countries, there appears to be no doubt that they may choose to be governed by the law of one state rather than the other. This may be done by a direct stipulation in the contract that it shall be deemed a contract and governed by the laws of one of such states or countries: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 53, on the place of a contract.

EVIDENCE—ENTRIES IN FAMILY BIBLE.—Entries in a family Bible are admissible to prove the date of birth, when primary evidence cannot be obtained: *Campbell v. Wilson*, 23 Tex. 252; 76 Am. Dec. 67. It has been held that these entries stand on the ground of family acknowledgments, and that they are admissible, on account of their publicity, without proof that the entries were made by a member of the family: *Campbell v. Wilson*, 23 Tex. 252; 76 Am. Dec. 67.

EVIDENCE—RULES OF—CONFLICT OF LAWS.—The rules of evidence in force in a state are applicable to all causes tried therein, whether the cause of action arose within or without the state, and whether the parties thereto are residents or non-residents: *Pennsylvania Co. v. McCann*, 54 Ohio St. 10; 56 Am. St. Rep. 695, and note.

INSURANCE—DECLARATIONS OF ASSURED AS EVIDENCE AGAINST BENEFICIARY.—Declarations and admissions of the assured are not binding upon the beneficiary: *Goodwin v. Provident Sav. etc. Assn.*, 97 Iowa, 226; 59 Am. St. Rep. 411; *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280; and are not admissible in evidence unless part of the res gestae: *Pennsylvania Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Schwarzbach v. Ohio Valley etc. Union*, 25 W. Va. 622; 52 Am. Rep. 227.

ROBERTSON v. SMITH.

[94 VIRGINIA, 250.]

JUDICIAL SALES—PROCEEDING AGAINST PURCHASER—MODE OF TAKING EVIDENCE UPON.—Upon confirming a commissioner's report of a sale or a rule against the purchaser or bidder at such a sale, to show cause why he should not be required to comply with the terms of his purchase or bid, courts of equity must be able to act in a summary manner. Either party may use *ex parte* affidavits, or the trial court may, in the exercise of a just discretion, require depositions to be taken, so that an opportunity for cross-examination may be had, or may refer the matter to one of its commissioners.

JUDICIAL SALES—DIFFERENCE BETWEEN AND THE TERMS OF THE DECREE.—Though the terms of a sale as reported by the commissioners differ from the terms of the decree under which they acted, the confirmation of the sale as thus reported cures these irregularities.

ONE WHO RELIES UPON THE STATUTE OF FRAUDS must ordinarily rely upon it in his pleadings.

JUDICIAL SALES—STATUTE OF FRAUDS.—Judicial sales made by a chancery court acting through its commissioners are not within the statute of frauds, but are binding upon the purchaser without any written contract or memorandum of sale signed by him or his agent.

JUDICIAL SALES.—A PARTY BY BUYING AT A JUDICIAL SALE SUBJECTS HIMSELF to the jurisdiction of the court, and, in effect, becomes a party to the proceedings in which the sale is made, and may be compelled to comply with his purchase by the process of the court.

Wyndham R. Meredith, for the appellant.

Shield & Newton and D. C. Richardson, for the appellees.

251 BUCHANAN, J. The commissioners who were directed to make the sales in this case reported to the court on the 11th of October, 1892, that they had sold the forty-two acre parcel of land to the appellant for the price of eighteen hundred dollars, and that the conditions of the sale were "that he should pay eighteen hundred dollars of the purchase money in cash, and assume the mortgage of ten thousand dollars, and also have the 'Quarry tract,' which was also subject to the lien of the mortgage, released from the same." They reported further that the appellant had paid "one thousand dollars as earnest of his good faith in the premises, but has not otherwise proceeded to comply with the terms of his purchase." On the 1st of November following, they reported to the court that the appellant was still in default in complying with the terms of sale in this, that he had not had the "Quarry tract" released from the lien of the mortgage, nor had he paid the same, and asked for a rule against him to show cause why the land should not be resold at his risk

and costs for his failure to comply with the terms of sale. A rule was awarded against him returnable to the 10th of November, and another returnable to the 15th of December, 1892, but no further action seems to have been taken upon these rules. Upon the 4th of February, 1893, James Netherwood, the purchaser of the "Quarry tract," which was sold to him by the same commissioners, upon the representation that the appellant had agreed to have the mortgage lien upon the "Quarry tract" released, asked for a like rule against the appellant, returnable to the eighth day of that month. To this rule the appellant answered that he had fully complied with the terms of his purchase according to his contract signed by the parties to the suit, and in accordance with the terms of a decree rendered in the cause on July 29, 1892, and that a deed, as provided for in that decree, had ²⁵² been delivered to him; and he filed with his answer the contract made with the parties to the suit. Upon the hearing of that rule, and a rule awarded against James Netherwood, the purchaser of the "Quarry tract," the affidavits of the commissioners who made the sale were read in evidence. This is assigned as error by appellant.

Upon a motion to confirm a commissioner's report of sale, or upon a rule against a purchaser or bidder at such sale to show cause why he shall not be required to comply with the terms of his purchase or bid, courts of equity must be able to act in a summary manner. It is the usual practice to allow ex parte affidavits to be read by either party. This is ordinarily the proper practice, but the trial court, in the exercise of a just discretion, may require depositions to be taken in whole or in part, instead of ex parte affidavits, so that an opportunity for cross-examination may be had, or it may refer the matter to one of its commissioners where there is a necessity for it: *Savery v. Sypher*, 6 Wall. 157; *Boyce v. Strother*, 76 Va. 862, 864; *Kable v. Mitchell*, 9 W. Va. 517; 2 *Barton's Chancery Practice*, 1103.

There was no objection made to the reading of the affidavits in the chancery court, and there is nothing in the record to show that the court erred in allowing them to be read, even if that question could be raised for the first time in the appellate court.

The deed executed to the appellant by the commissioners was executed without authority of the court, does not conform to the terms of the sale as reported and confirmed, was delivered to the appellant, it seems, by inadvertence of the commissioners, and, as declared by the court in its decree of February 10, 1893, was null and void.

The evidence in the case clearly shows that the appellant purchased the forty-two acre tract of land from the commissioners of the court upon the terms and conditions stated in their report filed October 11, 1892.

²⁵³ It is true, as contended by appellant, that the terms of the sale as reported differed from the terms of the decree under which the commissioners were acting, in this, that in addition to making the cash payment and assuming payment of the ten thousand dollar mortgage, as required by the decree, the purchaser also undertook to have the lien of the mortgage on the "Quarry tract" of land released. The confirmation of the report of the commissioners by the court cured this irregularity, and gave the sale of the commissioners the same validity and effect as if they had sold upon the precise terms of the decree: *Langyher v. Patterson*, 77 Va. 470; *Rorer on Judicial Sales*, secs. 122, 127. The confirmation of the sale as reported does not appear from the decree confirming the report (for a only a portion of the record was copied for this appeal, but from a recital of that fact in the decree of the court entered February 10, 1893. The court entered a decree requiring the appellant within sixty days to fully comply with the terms of his purchase by causing a proper release of the lien of the mortgage upon the "Quarry tract" of land to be made and delivered to the commissioners, and upon his failure to do so directed a sale of the land to be made at his risk and costs. This action of the court is assigned as error.

The appellant contends that, even if it were proved that he purchased the land from the commissioners of the court and not from the original owners, the contract was within the statute of frauds, and could not be enforced. There was no such defense made in the chancery court. A party who relies upon the statute of frauds must generally rely upon it in his pleadings; but if, in a summary proceeding by way of a rule to show cause, this were held to be unnecessary, his contention cannot be sustained. Judicial sales made by chancery courts, through its commissioners, are not within the statute of frauds, and are binding upon the bidder or purchaser without any written contract or memorandum of sale signed by him, or ²⁵⁴ his agent. By bidding he subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceedings in which the sale is made, and may be compelled to complete his purchase by the process of this court: *Brent v. Green*, 6 Leigh, 16, 24, 25; 2 *Lomax's Digest*, 43 (side p. 33); 2 *Minor's Institutes*, 4th ed.,

857; *Andrews v. O'Mahoney*, 112 N. Y. 567; *Warfield v. Dorsey*, 39 Md. 299; 17 Am. Rep. 562; *Reed on Statute of Frauds*; secs. 304, 305; *Brown on Statute of Frauds*, 5th ed., sec. 265.

Where a purchaser or bidder at such sale fails to complete his purchase, or to comply with the terms of sale, he may be proceeded against by rule, and compelled to do so: *Clarkson v. Read*, 15 Gratt. 288, 291; *Thornton v. Fairfax*, 29 Gratt. 669, 677; *Williams v. Blakey*, 76 Va. 254; *Hickson v. Rucker*, 77 Va. 135; 1 *Barton's Chancery Practice*, 161.

We are of opinion that there was no error in the decree appealed from, and it will be affirmed.

JUDICIAL SALES—CONFIRMATION—CURES WHAT IRREGULARITIES.—It is generally ruled that, as the order of confirmation of a judicial sale has the effect of a final judgment, it also has the effect of curing all irregularities in the proceedings leading up to the sale: See monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495. And such confirmation has been relied upon with success to establish the terms of the sale: Note to *Hammond v. Cailleaud*, 52 Am. St. Rep. 177.

STATUTE OF FRAUDS—HOW PLEADED.—The statute of frauds must be specially pleaded, and cannot be relied upon under the general issue: *Citty v. Manufacturing Co.*, 93 Tenn. 276; 42 Am. St. Rep. 919, and note. As a defense, the statute must be pleaded or it will be waived, even though it is brought out in the evidence: Note to *Feeney v. Howard*, 12 Am. St. Rep. 171, 172.

JUDICIAL SALES—PURCHASER SUBJECTED TO COURT'S JURISDICTION.—A purchaser at a master's sale, under order of a chancery court, submits himself to the jurisdiction of the court, and for some purposes makes himself a party to the proceedings: *Vanbibber v. Sawyers*, 10 Humph. 81; 51 Am. Dec. 694, and note.

JUDICIAL SALES—COMPELLING PURCHASER TO COMPLETE PURCHASE.—The proceedings necessary and proper to enforce a purchaser's completion of his purchase at a judicial sale are discussed in the monographic note to *Mount v. Brown*, 69 Am. Dec. 365-375.

JUDICIAL SALES UNDER STATUTE OF FRAUDS.—The certificate of sale provided by statute, or the sheriff's return on execution, is sufficient memorandum of a judicial sale to take it out of the statute of frauds: See monographic note to *Mount v. Brown*, 69 Am. Dec. 365; also, note to *Hutton v. Williams*, 76 Am. Dec. 307; *Greathouse v. Brown*, 5 T. B. Mon. 280; 17 Am. Dec. 67.

JAMESON v. RIXEY.

[94 VIRGINIA, 342.]

PARTITION.—A LIEN FOR OWELTY of partition partakes of the nature of a vendor's lien and follows the land into the hands of subsequent purchasers thereof.

A LIEN FOR OWELTY OF PARTITION is not released by taking the personal obligation of another or by other security for its payment, nor is it merged by a judgment or decree therefor, but sub-

sists until it is clearly shown to have been waived, released, or satisfied.

PARTITION.—OWELTY DOES NOT CONSTITUTE A PERSONAL CLAIM, and a decree undertaking to impose a personal obligation for it is erroneous.

A JUDGMENT FOR OWELTY in a suit for partition, though it purports to be against the parties personally, does not merge the lien or release the land from it.

STATUTE OF LIMITATIONS—OWELTY.—There was no statute in Virginia, prior to 1877, limiting the time within which a lien for owelty in partition could be enforced.

PAYMENT—PRESUMPTION OF.—Payment will be presumed after the lapse of twenty years, but may be inferred from circumstances tending to support it within a less period, but such presumption may be rebutted by evidence showing that payment has not in fact been made.

LACHES CANNOT BE IMPUTED TO A PERSON IGNORANT OF HIS RIGHTS.—Hence, a woman in whose favor owelty in partition was decreed will not be precluded by laches from asserting such decree, if it appears that, until a short time before the commencement of the present suit, she was not aware that such owelty had been awarded to her.

LACHES.—MERE DELAY IS NOT ALWAYS LACHES, as where such delay was due to the near kinship of the parties and their friendly relations.

NOTICE FROM TITLE PAPERS.—It is the duty of a purchaser to look to the title papers under which he buys. If he closes his eyes to this source of information, he does so at his peril. Hence, one whose title is dependent upon a decree in partition is chargeable with notice of owelty required by it to be paid, and which is a lien on one of the parcels set off to be held in severalty.

G. D. Gray and Eppa Hunton, Jr., for the appellant.

Rixey & Barbour and J. C. Gibson, for the appellees.

343 RIELY, J. The commissioners, in making partition of certain land, to which Kate R. Jameson and Mary George Gibson, the wife of J. C. Gibson, and others, were entitled, charged the parcel of land allotted to Mrs. Gibson with the sum of four hundred and nineteen dollars in favor of the parcel of land allotted to Mrs. Jameson for owelty of partition.

The circuit court of Culpeper county, by its decree of July 13, 1870, confirmed the partition and the report of the commissioners, and ordered and decreed that "J. C. Gibson and wife" pay to Kate R. Jameson the said sum of four hundred and nineteen dollars.

This suit was brought to subject the land on which the lien was charged to its payment. The circuit court held that the lien was merged in the personal decree made against Gibson and wife, and that, as the decree was barred by the statute of limitations, the lien could not be enforced, and dismissed the bill.

A lien for owelty of partition partakes of the nature of the vendor's lien, and constitutes a prior encumbrance upon the land on which it is charged, and follows the land into whosoever ³¹⁴ hands it may come. The lien is not released by taking the personal obligation of another, or other security for its payment, nor is it merged by a judgment or decree therefor, but subsists until it is clearly shown to have been waived, or released, or has been satisfied: *Coles v. Withers*, 33 Gratt. 186; *Hanna v. Wilson*, 3 Gratt. 243; 46 Am. Dec. 190; *Kinsely v. Williams*, 3 Gratt. 265; 46 Am. Dec. 193; *Paxton v. Rich*, 85 Va. 378, 383; *Jones v. Sherrard*, 2 Dev. & B. Eq. 179; *Dobbin v. Rex*, 106 N. C. 444; *Halso v. Cole*, 82 N. C. 161.

The court, by its confirmation of the partition made by the commissioners and of their report, confirmed and established the lien for four hundred and nineteen dollars on the parcel of land allotted to Mrs. Gibson, as provided by the commissioners in the division of the land. The decree in such cases properly should only adjudge that the amounts charged by the commissioners on the most valuable parcels of the land shall constitute liens thereon. The parcel of land on which the debt is charged is held in such cases to be "the debtor and the sole debtor," and not its owner. It is improper to decree personally against the tenant of the lot for the amount of the lien. We are, notwithstanding, however, of opinion that the personal decree against "J. C. Gibson and wife" did not have the effect of merging or abrogating the lien established on the land, but that the lien continued to exist and the land to remain the primary fund for its payment. The debt created by the lien was not his debt, and, if he had paid it under the force of the decree made against him, he would have been entitled in equity to be subrogated to the lien. And, so far as she was concerned, being a married woman, the decree was void as to her and a nullity.

In *Halso v. Cole*, 82 N. C. 161, it was held that a judgment obtained for the sums of money charged in partition proceedings upon a parcel of land for owelty of partition, and upon which execution had issued, did not merge the lien or release the ³⁴⁵ land from it, it not appearing that the judgment had been satisfied.

And in *Paxton v. Rich*, 85 Va. 378, Judge Lewis, in distinguishing between the lien of a judgment and a lien of the kind under discussion, said: "The lien [of a judgment] and the judgment are inseparable, and the extinguishment of the

latter is the extinguishment of the former. But not so where there is a judgment for a debt secured by a mortgage, deed of trust or a vendor's lien. There the lien is collateral to the judgment, and may be enforced in equity, although the judgment be barred or annihilated."

The circuit court erred in holding that the lien charged upon the land of Mrs. Gibson for owelty of partition was merged by the decree against her husband and herself, and that, as the decree was incapable of enforcement by reason of being barred by the statute of limitations, the lien was lost.

It was contended that, although the court below may have been mistaken in its opinion as to the effect of the decree, yet that the lien, if still existing, was itself barred by the statute of limitations. This position also is untenable. Prior to the code of 1887 there was no statutory limit to the enforcement of the vendor's lien, or the lien for owelty of partition, but, as before stated, these liens continued to exist until waived, released, or satisfied, or until sufficient time elapsed to raise the presumption of payment: *Coles v. Withers*, 33 Gratt. 186; *Hanna v. Wilson*, 3 Gratt. 243; 46 Am. Dec. 190; *Tunstall v. Withers*, 86 Va. 892; *Paxton v. Rich*, 85 Va. 378; *Smith v. Washington etc. R. R. Co.*, 33 Gratt. 617; *Bowie v. Poor School Soc.*, 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190; *Dobbin v. Rex*, 106 N. C. 444; *Ruffin v. Cox*, 71 N. C. 253; *Sutton v. Edwards*, 5 Ired. Eq. 425.

The present statute prescribing a limit to the enforcement of a deed of trust, mortgage, or lien reserved to secure the payment of unpaid purchase money (Code, sec. 2935), was enacted long after the creation of the lien sought to be enforced 346 in this case, and if the statute applies to a lien for owelty of partition, as to which no opinion is expressed, it being unnecessary to do so, it is very clear that it does not bar the plaintiff from enforcing her lien: Code, sec. 2938.

Nor can the presumption of payment be relied on to defeat the enforcement of the lien. Payment will be presumed after the lapse of twenty years, or may be inferred from circumstances tending to support it, within a less period than twenty years; but the presumption of payment is simply the presumption of a fact, and may be successfully rebutted by testimony: *Wharton on Evidence*, sec. 1361; *Snavely v. Pickle*, 29 Gratt. 27; *Booker v. Booker*, 29 Gratt. 605; 26 Am. Rep. 401; *Udpike v. Lane*, 78 Va. 132. This was fully done in this case. The husband of Mrs. Gibson, as well as the plaintiff, deposed posi-

tively that no part of the debt had been paid, and there was no evidence to the contrary.

It was further contended that the right to enforce the lien had been lost by the laches of the plaintiff. The partition was made in 1870, and, as we have seen, was confirmed by the court in July of that year. This suit was instituted in 1892.

The evidence shows that the plaintiff was not aware of the lien until the summer of 1890, when, having occasion to examine the record of the partition suit in the clerk's office for the purpose of ascertaining on which side of the division line between Mrs. Gibson and herself was a certain house, she discovered the lien charged in her favor upon the former's land. This is made very clear by her own testimony, and that of Mrs. Randolph, who was at that time the deputy clerk of the court. Mrs. Jameson instituted her suit to enforce the lien within less than two years thereafter, which was within a reasonable time after making the discovery. It has been repeatedly held by this court, as a well-settled rule of equity jurisprudence, that laches cannot be imputed to a person who is ignorant of his or her rights: *Rowe v. Bentley*, 29 Gratt. 347 763; *Lamar v. Hale*, 79 Va. 147; *Massie v. Heiskell*, 80 Va. 789.

It was argued, however, that the plaintiff, being a party to the partition suit, must be considered to have had notice of the lien from the time it was created. That suit, so far as the record before us discloses, was a friendly one, and was conducted and managed by the father of Mrs. Jameson and Mrs. Gibson, and the other parties entitled to the land, and there is no evidence that she had actual knowledge of the provisions of the division prior to her discovery of the lien in 1890. But conceding that she had knowledge of it all the time, the debtor as well as the creditor is still alive, and no evidence has been lost by the death of either of the parties to the transaction, or by the destruction of records, or loss of papers, the equitable circumstances which generally constitute the grounds for the application of the doctrine of laches: *Rowe v. Bentley*, 29 Gratt. 763; *Bargamin v. Clarke*, 20 Gratt. 553; *Morrison v. Householder*, 79 Va. 627.

It is perfectly clear that the lien has never been satisfied, but that the debt is still due. Nor was any sufficient ground shown to warrant the presumption of an abandonment of the claim. Mere delay is not always to be considered laches; and it is explained in this instance by the near kinship of the parties and their friendly relations, living in the same house

for a great part of the time, by the fact that Mrs. Gibson was a borrower of money from Mrs. Jameson from time to time until the aggregate reached a very considerable sum; and by the further fact that Mrs. Gibson was without means of discharging the lien except by a sale of the land.

It was still further contended that the plaintiff was estopped from enforcing the lien against the land in the possession of Mrs. Rixey as purchaser, but it is not easy to see upon what ground the doctrine of estoppel can be invoked in this case. The record discloses no act of deception in the conduct or ³⁴⁸ declaration of Mrs. Jameson, nor such gross negligence on her part as to amount to fraud, by which Mrs. Rixey was misled to her injury. Nothing is charged against her except her silence. It is insisted that she should have asserted her lien or made known to Mrs. Rixey her claim to it during the long litigation between Le Grand and wife, and Samuel Rixey, and between them in Mrs. Rixey, his administratrix, after his death.

The partition suit was the very source of the title to the particular parcel of land involved in this controversy. It was the instrumentality by which the undivided interest of Mrs. Gibson in the tract of land devised to her and the other children of Elizabeth Shackelford was segregated and defined. The suit was referred to by its name and style, and the partition therein made adopted, by the trustee in advertising for sale by direction of Samuel Rixey the lots acquired by Mrs. Le Grand and Mrs. Gibson respectively for the payment of the debt to Samuel Rixey, and which their undivided interests were conveyed to secure prior to the partition. The advertisement not only referred to the suit and the partition therein made, but also designated the book and the page thereof in the clerk's office in which the partition was recorded. A copy of the advertisement was filed as an exhibit with the bill in the suit of Le Grand and wife v. Rixey, and became a part of the record thereof. Samuel Rixey also filled as an exhibit with his answer to the bill a copy of the report of the commissioners making the partition. These records, if inspected, could but have brought home to the purchaser of the land under the decree made in the last-mentioned suit knowledge of the lien charged thereon for owelty of partition. It is the duty of a purchaser to look to the title papers under which he buys. If he close his eyes to the sources of information, he does so at his peril. "Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself": *Wood v. Krebs*, 30

Gratt. 708; Long v. Weller, 29 Gratt. 347; Burwell v. ³⁴⁹ Fauber, 21 Gratt. 446; Lamar v. Hale, 79 Va. 147.

Mrs. Rixey, as purchaser of the land under the decree made in the said suit, was affected with notice of all that the record disclosed affecting the title to the land, and also of all to which knowledge there acquired would have led her. She was clearly put upon inquiry. If she had performed her duty, and availed herself of the means pointed out to her, and easily within her reach, she must necessarily have discovered the encumbrance in favor of Mrs. Jameson, and could have ascertained from her whether it had been satisfied or abandoned. She neither made the examination which was her duty as purchaser, nor inquired of Mrs. Jameson, and her injury is the result of her own negligence.

The facts in regard to the encumbrance were matters of public record, and as accessible to Mrs. Rixey as to Mrs. Jameson. Where the same means and opportunity of tracing the title to real estate are equally open to both parties, the doctrine of equitable estoppel does not apply. It is essential for the application of the doctrine of estoppel in pais with respect to the title of real property, said Justice Field, in delivering the opinion of the supreme court in Brant v. Virginia Coal etc. Co., 93 U. S. 337, "that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

No sufficient ground of defense has been shown against the enforcement of the lien of the plaintiff against the land in the bill mentioned. The decree appealed from must therefore be reversed, and the cause remanded to the circuit court for further proceedings to be had therein to that end.

PAYMENT—PRESUMPTION OF, FROM LAPSE OF TIME.—Presumption of payment after a lapse of twenty years is an artificial and arbitrary rule of law, and, unlike the statute of limitations, is not a bar to an action on the original contract: Gregory v. Commonwealth, 121 Pa. St. 611; 6 Am. St. Rep. 804. The presumption is a disputable one: Barker v. Jones, 62 N. H. 497; 13 Am. St. Rep. 586, and note; and may be overcome by other facts and circumstances: Lewis v. Schwenn, 93 Mo. 26; 3 Am. St. Rep. 511. But the burden of proof is thrown on the creditor to show that payment of the debt has not been made: See monographic note to Alston v. Hawkins, 18 Am. St. Rep. 879.

LACHES—WHAT CONSTITUTES.—Mere lapse of time alone cannot constitute laches: *Demuth v. Old Town Bank*, 85 Md. 315; 60 Am. St. Rep. 322, and note. There must have been knowledge, actual or imputable, of the facts which should have prompted a choice either to diligently seek equitable relief or thereafter to be content with such remedies as a court of law might afford, or if there was actual ignorance, that must have been without just excuse: *Bausman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661. See monographic notes to *Neppach v. Jones*, 23 Am. St. Rep. 148-151, and *Bell v. Hudson*, 2 Am. St. Rep. 795-808.

NOTICE—RECITALS IN TITLE PAPERS.—Purchasers of land are deemed to have notice of every fact disclosed by the record affecting their title, and every other fact which an inquiry suggested by the record would have led up to: Note to *Doran v. Dazey*, 57 Am. St. Rep. 555; *Anderson v. Blood*, 152 N. Y. 285; 57 Am. St. Rep. 515.

BALLOU v. BALLOU.

[94 VIRGINIA, 350]

COTENANTS—IMPROVEMENTS—RIGHT TO RECOVER FOR IN PARTITION.—A cotenant improving the common property at his own expense can, in a partition suit, have compensation, though his cotenant did not consent to the improvement nor promise to pay therefor. An allowance for compensation for improvements is in all cases made, not as a matter of legal right, but purely from the desire of the court to do justice, and must be estimated so as to involve no injury of the cotenant against whom the improvements are chargeable.

COTENANTS — IMPROVEMENTS — AGREEMENT FOR—STATUTE OF LIMITATIONS.—In a suit for partition, the claim of one of the cotenants for compensation for improvements made by him cannot be barred by the statute of limitations.

COTENANTS — IMPROVEMENTS.—AN ACTION OF ASSUMPSIT CANNOT BE MAINTAINED by one cotenant against another for improvements placed upon the common property by the plaintiff without the consent of the defendant, in the absence of any promise made by him to pay therefor. The remedy to obtain compensation for such improvements can be asserted only in a suit for partition.

Edward S. Brown, for the appellants.

Wilson & Manson, for the appellees.

³⁵¹ **HARRISON, J.** In the year 1871, Charles H. Ballou and his nephew, Isaiah Ballou, became joint owners of a lot in the city of Lynchburg. Improvements were afterward erected on part of the lot and occupied by both parties until the year 1891, when Charles H. Ballou died. This is a partition suit between Isaiah Ballou and the other heirs of Charles H. Ballou to divide the lot and improvements thereon among the parties entitled thereto. Depositions were taken, and a commissioner's re-

port made, satisfactorily establishing that the lot had never been divided between Isaiah Ballou and Charles H. Ballou; that up to the date of the latter's death they had owned and occupied the property jointly; that the value of the lot was four hundred dollars, and the value of the improvements nine hundred dollars; and that Charles H. Ballou had paid eight hundred and seventy dollars of the cost of the improvements, and Isaiah thirty dollars thereof. The commissioner further found that Charles H. Ballou's estate was entitled to credit for the excess of improvements he had put upon the lot over that expended by his cotenant Isaiah Ballou, and that said estate was also entitled in the same proportion to the rents arising from said property from and after the death of Charles H. Ballou. The lower court declined to sustain this view of its commissioner, and entered a decree holding that Charles H. Ballou's estate was entitled to no credit, by way of compensation for the improvements made by him, and that Isaiah Ballou was entitled to one-half the joint property including the improvements, and also to one-half the rents accruing since the death of Charles H. Ballou, and should be paid in that proportion from the proceeds of sale which was ordered to be made because the property was not susceptible of division in kind.

The question thus raised is whether or not one joint tenant who improves the common property at his own expense can, in a partition suit, have compensation for such improvements.

³⁵² The result of a decided preponderance of the authorities is that where one tenant in common lays out money in improvements on the estate, although the money so paid does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, or a promise, on their part, to contribute their share of the expense, nor is it necessary for him to show a previous request to join in the improvements, and their refusal. The allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the court to do justice, and therefore the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged: Freeman on Cotenancy and Partition, sec. 510; 3 Pomeroy's Equity Jurisprudence, sec.

1389; 1 Story's Equity Jurisprudence, sec. 655; *Ruffner v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513; note to *Robinson v. McDonald*, 62 Am. Dec. 482, and the cases there cited.

It is insisted by appellee that a claim for improvements is merely a personal debt owing from one party to another, due in the absence of a contract making other stipulations, so soon as the improvements are completed, and that, inasmuch as there was no express agreement for a lien, the only ground upon which the estate of Charles H. Ballou could recover is upon an implied contract, and that therefore the claim, though asserted in a court of equity, rests upon an assumpsit, and, as equity follows the law, it will apply the bar of the statute of limitations just as a court of law would have done had the claim for improvements been asserted by an action of assumpsit.

This position is not tenable. No action of assumpsit could have been maintained to recover any part of the cost of these ³⁵³ improvements from appellee. He was under no obligation to contribute to them. A cotenant cannot recover from his fellow tenants a share of the expense incurred by him in making improvements upon the common property, in the absence of an express assent on their part, or of such circumstances or dealings between the parties as will convince the court that an understanding existed to the effect that the expenses were to be repaid: *Freeman on Cotenancy and Partition*, sec. 262; 1 *Washburn on Real Property*, marg. p. 421; note to *Robinson v. McDonald*, 62 Am. Dec. 483, and cases there cited. The right to claim compensation for improvements made under the circumstances disclosed by the record does not arise until the suit for partition is brought, and the right to partition arises whenever the parties may choose to assert it. Statutes of limitation have no application to suits for partition, nor to the equity for compensation which arises only when the partition is asked for.

The cases cited in support of the contention that Charles H. Ballou had a right of action against appellee for the improvements made are cases where the action was brought to recover compensation for repairs to the common property made by one cotenant. The rule applicable in the matter of repairs is different from that in the case of improvements. In the former case, the weight of authority is that, when the repair of joint property is necessary to its use and preservation, one joint tenant, when his fellows refuse to unite, may have the property repaired and sue for compensation, but we have been referred to

no authority which holds that this can be done in the case of improvements.

The case at bar comes clearly within that class where a court of equity will not grant a partition without directing an account, and suitable compensation.

Under rule IX of this court, appellee assigns as error in the decree appealed from the action of the court below in overruling his first exception to the commissioner's report. ³⁵⁴ This exception related to the amount of rent charged to appellee on account of the joint property in his possession since the death of Charles H. Ballou. Without going into the particulars of this account it is sufficient to say that a careful examination of the commissioner's report, and the evidence upon which it is based shows that it is subject to no valid objection. The findings of the commissioner are in accordance with the law, the rights of the parties concerned are accurately ascertained and adjusted, and all exceptions thereto should have been overruled, and the report in all respects confirmed.

For the foregoing reasons the decree appealed from must be reversed and set aside, and the cause remanded to the court below to be there proceeded with in accordance with the views expressed in this opinion.

COTENANCY—RECOVERY FOR IMPROVEMENTS IN PARTITION.—There is no remedy by an action at law on behalf of one cotenant, in the absence of an agreement, express or implied, for improvements made by the former on the common property: See monographic note to *Ward v. Ward*, 52 Am. St. Rep. 936. His remedy is in a suit for partition. A proceeding for partition usually takes place in a court of equity, or in a court governed, in that proceeding, by equitable principles. One of these principles is, that he who seeks equity must do equity, and every party to such a suit or proceeding may properly be regarded as an actor and as seeking equity, and therefore as subjecting himself to the rule that he must do equity before he will be declared entitled to what he seeks. In partition, either of the parties may therefore compel an accounting from the other, and in this accounting repairs or improvements and rents and profits may always be taken into consideration, and each of the parties be required to submit to what the court may deem equitable in relation thereto: Monographic note to *Ward v. Ward*, 52 Am. St. Rep. 939, 940. Compare *Cosgriff v. Foss*, 152 N. Y. 104; 57 Am. St. Rep. 500, and note.

PARTITION—STATUTE OF LIMITATIONS AS APPLIED TO.—The statute of limitations of twenty years is not applicable to an action of partition: *Peden v. Cavina*, 134 Ind. 494; 39 Am. St. Rep. 276.

BOLTON v. VELLINES.

[94 VIRGINIA, 393.]

PLEADING—FALSE IMPRISONMENT.—In a complaint seeking to recover for the false imprisonment of the plaintiff, it is not necessary to aver in express terms that such imprisonment was against the will of the plaintiff, if it is apparent from the whole complaint that the imprisonment of the plaintiff was without any collusion on his part and not with his consent.

MUNICIPAL CORPORATIONS.—THE POWER TO IMPRISON must be plainly given or it does not exist, and, when given, before it can be exercised, there must be a judicial ascertainment, by a competent tribunal or magistrate, of the guilt of the accused. The authority given to a municipal corporation to impose a fine does not include the power to imprison for its nonpayment.

CRIMINAL LAW—FINES—ENFORCEMENT OF BY IMPRISONMENT.—Where a municipal corporation is given authority to enact by-laws and to enforce obedience to them by fines, it is limited to the mode prescribed, and cannot imprison nor authorize imprisonment.

POLICE COMMISSIONERS ARE NOT JUDICIAL OFFICERS.—Hence they are liable for directing the arrest and imprisonment of a citizen upon a charge which does not constitute a crime, or if it does constitute a crime, is not punishable by arrest and imprisonment.

FALSE IMPRISONMENT.—POLICE COMMISSIONERS ARE LIABLE to an action for false imprisonment in directing the arrest and imprisonment of a citizen for an act which is punishable by fine only.

FALSE IMPRISONMENT—MALICE.—An instruction to the jury on the trial of an action for false imprisonment that an improper motive may be inferred from a wrongful act based upon no reasonable ground, that such improper motive constitutes malice in law, and that the act need not be prompted by anger, malevolence, or vindictiveness, but such inference of malice may be removed by evidence, is not erroneous. It clearly defines malice in an action for false imprisonment.

DAMAGES IN AN ACTION FOR FALSE IMPRISONMENT. It is proper to instruct the jury that the damages awarded must be compensatory for the loss of time, for suffering, bodily and mental, sustained by reason of the wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorneys' fee, and that if the act was committed with malice, punitive damages may be awarded.

DAMAGES FOR FALSE IMPRISONMENT—VERDICT—WHEN NOT EXCESSIVE.—If the plaintiff, who had been a captain of police, and honestly believed that his official life continued until his successor had qualified, on appearing on the streets in the uniform of his former office, was arrested and carried through the streets in a prison van, searched, and kept in prison until released by habeas corpus, there being no right to imprison for his offense, is, in an action for false imprisonment, awarded the sum of one thousand dollars, the verdict will not be set aside as so excessive as to suggest passion, prejudice, or ill-will.

Action of trespass for false imprisonment. The defendants pleaded that they were police commissioners of Norfolk; that as

such they had removed plaintiff from the office of captain of police; but that he, nevertheless, persisted in appearing in the uniform of his former office; that the defendants, for the purpose of enforcing the laws and without any intent to injure the plaintiff, issued an order instructing the police officers, if he again appeared on the streets in such uniform, to arrest him; and that he did so appear and was thereupon arrested by a policeman, gently and without undue violence, for the purpose of taking the plaintiff before the police justice for proper disposition. A demurrer to this plea of the defendants was sustained. Thereupon they pleaded not guilty and the parties went to trial and the jury returned a verdict in favor of the plaintiff for one thousand dollars. All the instructions asked by the defendant were refused.

Thomas W. Shelton and T. S. Garnett, for the plaintiffs in error.

Neely, Seldner & Warrington and J. F. Duncan, for the defendant in error.

397 KEITH, P. John T. Bolton and C. E. Verdier, styling themselves police commissioners, on the eighteenth day of August, 1894, addressed the following letter to Captain C. J. Iredell, chief of police, Norfolk, Virginia:

"Dear Sir: The board of police commissioners are informed **398** that Mr. M. J. Vellines, ex-captain of police, has been seen on the streets and has been at police headquarters in the uniform of captain of police, as he claimed that he is such. This action on his part is contrary to the laws and ordinances bearing on the same, and inasmuch as the board is also informed that you have permitted this violation to go unnoticed, you are requested to report to the board why you have failed in discharging your duty on this point.

"You are now instructed by the board of police commissioners that on and after Monday, the twentieth day of August, if Mr. Vellines, or any other dismissed person, formerly on the police force of this city, should appear on the streets of this city wearing the uniform of a police officer, that you shall at once have the person arrested and taken before the police justice for proper disposition."

Vellines, in disregard of this order, appeared upon the streets in the prohibited uniform, and was thereupon arrested in obedience to the authority conferred by the above letter, was placed in the prison van, carried to the station-house, searched, and

confined until discharged upon a writ of habeas corpus by order of the judge of the corporation court of the city of Norfolk. He thereupon instituted an action in the court of law and chancery in the city of Norfolk for false imprisonment against Bolton and Verdier. The defendants appeared and pleaded, the cause was tried before a jury, and a verdict rendered in favor of the plaintiff for one thousand dollars, upon which the court entered judgment. The defendants moved the court to set aside the verdict and grant a new trial, which the court overruled; thereupon they presented their petition for a writ of error to this court, which was allowed. In the petition there are several assignments of error which will be considered.

The fourth assignment of error is to the action of the court in overruling the demurrer to the declaration. This is an action ³⁰⁹ for false imprisonment, and the objection taken in the argument that there is no averment that the imprisonment was against the will of the plaintiff, and secondly, that there is no allegation that the plaintiff was charged with any offense of which he was tried and acquitted, are not well taken. It is true the words "against the will of the plaintiff" do not appear, but it does sufficiently appear that his arrest and imprisonment were against his will and without any collusion upon his part, and it is stated that the plaintiff was charged with an offense, and that the prosecution thereof was abandoned, and the prosecution and arrest fully ended. There was no error in overruling the demurrer.

Nor was there error in denying oyer of the order of the police commissioners; nor in refusing to allow the special pleas to be filed; nor in permitting the introduction of the record of the suit of the City of Norfolk v. M. J. Vellines.

It is assigned as error in the petition that the court misdirected the jury, that the damages awarded by the jury are excessive, and that the verdict is contrary to the law and the evidence.

The instructions given by the court at the instance of the plaintiff are as follows:

"1. The court instructs the jury that the defendants, acting as a board of police commissioners, or a majority thereof, had no right to order the arrest of the plaintiff for publicly wearing the uniform and badge prescribed by said board for the police force.

"2. The court further instructs the jury that the defendants

had no right, in their capacities as individuals, to give such order.

"3. The court further instructs the jury that if they shall believe from the evidence that the defendants, whether acting as the board of police commissioners or as individuals, did issue an order for the arrest of the plaintiff for so wearing such uniform, and that because of such order, so issued, the said ⁴⁰⁰ plaintiff was arrested and imprisoned, then they must find for the plaintiff.

"4. The court further instructs the jury that an improper motive may be inferred from a wrongful act based upon no reasonable ground; and that such improper motive constitutes malice in law. And to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence, or vindictiveness; but such inference of malice may be removed by the evidence in the case.

"5. If the jury believe from the evidence that the defendants were guilty of the wrongful act or acts alleged in the declaration, they must award to the plaintiff such compensation in damages as he may prove for the loss of time, for the suffering, bodily and mental, sustained by reason of such wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee. And if the jury believe from the evidence the said wrongful act or acts to have been committed by the defendants with malice, they may also award to the plaintiff punitive damages."

The proposition which lies at the foundation of this case is contained in the first instruction. The charter of the city of Norfolk provides "that said board of commissioners [police commissioners] may prescribe such uniforms and badges for the police force as they may deem proper, and direct in what manner they shall be armed. And if any person other than a policeman shall publicly wear such uniforms and badges as aforesaid he may be subjected to such fine, not exceeding the sum of one hundred dollars, as the city councils may ordain." In pursuance of the power thus conferred by the charter, the councils passed an ordinance providing "that any person other than a member of the police department who shall publicly use such badges and uniforms as the board of police commissioners have prescribed, or may prescribe, for the use of such members, or shall make use of the whistles, calls, or other modes of signalling that are used by the police department,

⁴⁰¹ shall pay a fine of not less than five nor more than twenty dollars."

The act forbidden is not an offense against the commonwealth. It is the violation of a city ordinance which the state, in the charter which is conferred upon the city, authorizes it to punish by the imposition of a fine not exceeding one hundred dollars, and which the city by its ordinance punishes by imposition of a fine not less than five dollars, nor more than twenty dollars. The charter is the authority to the city to pass the ordinance, and the ordinance is the execution of the power conferred by the charter. It remains always, however, a violation of the police regulations of the city, and not a crime of any degree against the peace and dignity of the commonwealth.

It is well settled that unless the power to imprison be plainly given, it does not exist; and, when given, before it can be exercised, there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party accused: 1 Dillon on Municipal Corporations, 4th ed., sec. 353. And where a corporation is empowered to enforce its by-laws in a special manner by fine it is limited to the manner prescribed," 2 Dillon on Municipal Corporations, sec. 336.

In *Ex parte Burnett*, 30 Ala. 461, it is said: "Each member of the town council has power and authority as a magistrate within the corporate limits of the town to impose fines, not exceeding fifty dollars, and to imprison for not more than three days, for the violation of a municipal ordinance; but, before the power to imprison can be exercised, there must have been a judicial ascertainment of the fact that such ordinance has been violated."

In *Brieswick v. Mayor*, 51 Ga. 639, 21 Am. Rep. 240, a municipal corporation was authorized by its charter to make by-laws, and punish their infraction by fine or imprisonment. Held, that this did not authorize imprisonment for nonpayment of a fine imposed by an ordinance.

⁴⁰² The case of *Slessman v. Crozier*, 80 Ind. 487, is even more stringent, for in that case the charter authorized the city, among other things, to restrain from running at large sheep, swine, or other animals, and to impose a fine for the offense not to exceed ten dollars. The marshal of the town impounded and advertised for sale, under an ordinance of the town, certain hogs of the appellant. The court citing what we have already quoted from Dillon on Municipal Corporations, "that

where a corporation is empowered to enforce its by-laws in a special manner by fine it is limited to the manner prescribed," held that a town might lawfully impose the fine, but had no power to provide by ordinance for the impounding and selling of animals running at large in their streets or other public places.

In *State v. Bright*, 38 La. Ann. 1, 58 Am. Rep. 155, it is held that a municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass by fine or imprisonment, or other penalty, unless that right has been unquestionably conferred by the lawgiver. The reason given is, that the punishment of a citizen for the commission or omission of an act is a prerogative which appertains to the sovereign only.

"It is settled in England, in accordance with the principles of Magna Charta, that without the express sanction of parliament, no by-law can be enforced by disfranchisement of the offender, or by his imprisonment, or by forfeiture of his goods or property. Under incidental power to pass by-laws, a corporation may, in England, annex pecuniary penalties of a certain, fixed, and reasonable character, but without express authority given by a statute, the only penalty it can prescribe is a pecuniary one, usually called a fine": 1 Dillon on Municipal Corporations, sec. 336.

The court did not err in granting the first instruction.

The second instruction embraces a proposition, if possible, even less obnoxious to objection, viz., "that the defendants had no right, in their capacity as individuals, to give such order."

⁴⁰³ The third instruction directs the jury that if they "believe from the evidence that the defendants, whether acting as the board of police commissioners or as individuals, did issue an order for the arrest of the plaintiff for so wearing such a uniform and that, because of such order so issued, the said plaintiff was arrested and imprisoned, then they must find for the plaintiff." The plaintiffs in error contend that they were acting in a quasi judicial capacity, and are therefore protected from liability therefor.

It is true, as decided in *Jenkins v. Waldron*, 11 Johns 114, 6 Am. Dec. 359, that "officers required by law to exercise their judgments are not answerable for mistakes in law, or mere errors in judgment, without any fraud or malice"; but, in order that officers, judicial or otherwise, may claim immunity for their acts,

they must keep within the limit of the jurisdiction assigned to them by law.

"Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times, and for all purposes. When he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is the judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not, either actually or constructively, before him for the purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all": Cooley on Torts, 2d. ed., 486.

404 "It is universally conceded that when inferior courts or judicial officers act without jurisdiction the law can give them no protection whatever": Cooley on Torts, 489.

The plaintiffs in error can find no shelter under the principle they have invoked. They were not judicial officers, and the offense complained of was not a judicial act. The fault of which the defendant in error was guilty, if indeed it be a fault, had not been committed when the order for his arrest was issued to the police force of Norfolk. Nor was there any authority of law for his arrest and imprisonment for wearing the uniform of a policeman, granting that he was guilty of a violation of the ordinance. The city had no power to punish the offense by imprisonment, but by a fine only, so that the arrest and imprisonment was without justification or excuse. There was no error in the third instruction.

The fourth instruction tells the jury that an "improper motive may be inferred from a wrongful act based upon no reasonable ground, and that such improper motive constitutes malice in law; that the act need not be prompted by anger, malevolence, or vindictiveness, but such inference of malice may be removed by the evidence. This is a correct definition of malice in an action for false imprisonment": See *Forbes v. Hagman*, 75 Va. 163.

The fifth instruction is as to the measure of damages, and

the elements of damage to be considered by the jury. They are told that the damages awarded must be compensatory for the loss of time, for the suffering, bodily and mental, sustained by reason of such wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee. The jury are then instructed that if they believe the act to have been committed by the defendants with malice, they may also award to the plaintiff punitive damages. This instruction is unobjectionable.

We are of opinion that the instructions given by the court correctly propound the law, and the instructions asked for by ⁴⁰⁵ the plaintiffs in error and refused by the court were properly refused.

The evidence shows that the defendant in error, who had been captain of the police of the city of Norfolk, whose term of office had expired, but who honestly believed that his official life was extended by law until his successor had qualified, appeared upon the streets in the uniform of an officer of police. For this he was arrested, carried through the streets in a prison van, first searched, and then kept in prison until released upon a writ of habeas corpus. For this indignity to which he was subjected by the plaintiffs in error, acting without a vestige of authority, the jury awarded him the sum of one thousand dollars as damages. The court of law and chancery of the city of Norfolk refused to set that verdict aside. There is no precise measure of damages in such cases. It is impossible to ascertain in money the exact equivalent for bodily or mental pain. Therefore, where they are elements of damage to be estimated by a jury, the verdict will not be disturbed, unless it is so excessive as to suggest prejudice, passion, or ill-will.

The defendant in error had been the captain of the police force of the city of Norfolk. It is to be presumed that he was a man of character and consideration in that community. He was known to the court and jury before which he appeared, and, taking all these circumstances into consideration, we find ourselves unable to disturb the verdict as contrary to the law and evidence.

The judgment of the court of law and chancery of the city of Norfolk must be affirmed.

MUNICIPAL CORPORATIONS—POWERS—ENFORCEMENT OF ORDINANCES.—Any fair, reasonable doubt concerning the existence of power in a municipal corporation is resolved against it

and the power denied: *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370. Power to pass a by-law carries, as an incident, the power to enforce its observance by some reasonable penalty: *Mayor v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441; but a city has no power to punish disobedience of its orders by fine, imprisonment, or other penalty, unless it is especially granted in its charter: *State v. Bright*, 38 La. Ann. 1; 58 Am. Rep. 155. Thus, authority to enforce by-laws by fine or imprisonment does not authorize imprisonment for non-payment of a fine imposed by a by-law: *Brieswick v. Mayor*, 51 Ga. 639; 21 Am. Rep. 240; note to *State v. Boneil*, 21 Am. St. Rep. 418.

FALSE IMPRISONMENT—LIABILITY OF OFFICER ORDERING ARREST.—Where one is arrested on the procuring of a justice or other inferior magistrate acting without his jurisdiction, such magistrate is liable to an action for false imprisonment by the person so injured: See monographic note to *Mitchell v. State*, 54 Am. Dec. 263. As to the liability of judicial officers acting without their jurisdiction, see monographic notes to *Yates v. Lansing*, 6 Am. Dec. 303-305, and *McCall v. Cohen*, 42 Am. Rep. 648-650. Whether boards of police should be regarded as courts or quasi corporations, quare: *Board of Police v. Grant*, 9 Smedes & M. 77; 47 Am. Dec. 102.

FALSE IMPRISONMENT—ESSENTIALS—DAMAGES.—False imprisonment is an unlawful restraint of a person contrary to his will. Malice need not exist; though, if present, it may be considered in aggravation of damages: *Rich v. McInerny*, 103 Ala. 345; 49 Am. St. Rep. 32, and note. Evidence tending to show that the plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no power to issue, is sufficient to sustain such action: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note. See *Patterson v. Prior*, 18 Ind. 440; 81 Am. Dec. 367. The jury has the right to give damages beyond the mere compensation to the plaintiff for his injuries, but exemplary damages are only allowable where it appears that the wrong for which the plaintiff sues was done with evident intention and from bad motive: See monographic note to *Mitchell v. State*, 54 Am. Dec. 270, 271.

FIFIELD v. VAN WYCK.

[94 VIRGINIA. 557.]

CONVERSION OF REALTY INTO PERSONALTY BY A WILL.—Though executors are directed to sell real property and convert it into money, and actually make such sale, the proceeds are not thereby converted into personality, if the purpose for which the sale was directed to be made is one not permitted by law. Therefore, the moneys so realized belong to the heir at law.

WILLS—ESTOPPEL TO CONTEST—WHEN DOES NOT RESULT FROM ACCEPTING A LEGACY.—An heir at law who accepts a legacy with full knowledge of the facts is not thereby estopped from attacking a residuary clause in the will, where its provisions are not of a character to require an election to be made, and the will does not attempt to dispose of any property right of such legatee.

WILLS.—A CONDITION THAT A LEGATEE ATTEMPTING TO SET ASIDE THE WILL, or any part thereof, or to cause litigation over it, shall forfeit his legacy, and it shall revert to the estate, is in terrorem and inoperative, when there is no gift over on the breach of the condition.

CHARITABLE USE—BEQUEST TO—WHEN NOT SUFFICIENTLY CERTAIN.—A devise or bequest to two designated persons, or the survivor of them, or to whomsoever they may select in case of their death, in trust for the benefit of the New Jerusalem Church (Swedenborgian), as they shall deem best, is an attempt to create so vague and uncertain a trust that it cannot be enforced by a court of equity. The testator must, therefore, be deemed to have died intestate as to the property which he thus attempted to dispose of.

CHARITABLE USES AND TRUSTS—CORPORATION—WHEN NOT A BENEFICIARY.—A devise to trustees in trust for the benefit of the New Jerusalem Church, as they shall deem best, does not show that the church named was intended to be either the beneficiary or the agency by which the trust was to be administered, and there being nothing by which a court of equity can control the discretion of the trustees or ascertain whether they have committed a breach of the trust, it cannot be sustained.

Staples & Munford and L. L. Lewis, or the appellants.

Tunstall & Thom, for the appellees.

559 **BUCHANAN, J.** This controversy arises under the residuary clause of the last will and testament of Lenore M. Van Wyck, late of the city of Norfolk. After making a number of specific bequests the testatrix declares that "all the rest and residue of my said estate, real and personal, wherever situate, and of whatever kind, I give, devise, and bequeath to the Reverend S. S. Seward, of New York city, and to the Rev. J. C. Ager, of Brooklyn, state of New York, or the survivor of them, or to whomsoever they may select, in case of their death, in trust for the benefit of the New Jerusalem Church (Swedenborgian) as they shall deem best."

The executor filed his bill to have certain clauses in the will 560 construed, and the validity of the residuary clause determined by the court. To that bill the trustees named in the residuary clause filed their answer, in which they stated that the New Jerusalem Church was the general name by which, among themselves, that body of Christians who accept the teachings of Emmanuel Swedenborg (popularly called Swedenborgian) were known during the life and at the death of the testatrix; that the legal and representative general agency of the New Jerusalem Church for the purpose of receiving, and taking by gift, devise, or otherwise, property, real and personal, for educational or religious purposes, was "The General Convention of the New Jerusalem in the United States of America," a corporation chartered under the laws of the state of Illinois; that this corporation was, during the lifetime of the testatrix, the only legal and representative agency

of the general body of Christians in the United States known as the New Jerusalem Church; that the testatrix was during her lifetime a firm and consistent member of that church, and manifested great interest in and contributed largely to the spreading of its doctrines, and had, as respondents were informed, expressed her intention of leaving her residuary estate to the said church for religious and educational purposes; that they were, during the lifetime of the testatrix and are now, members of the executive committee or general council of that corporation, and that by its charter (a copy of which is filed with the answer as an exhibit) it is provided that the business affairs of the corporation shall be managed and controlled by such committee or council, subject to the direction of the convention when in session, and that they are advised and believe that the residuary bequest to them in trust "for the benefit of the New Jerusalem Church (Swedenborgian)" is, and was intended by the testatrix to be, a bequest to them in trust for the benefit of the "General Convention of the New Jerusalem in the United States of America."

561 That corporation by petition became a party to the suit, and in its answer claimed that the bequest was intended for its benefit, and as a ground for its claim made substantially the same statements as those made by the trustees in their answer. Parol evidence was taken to prove the averments contained in the answers, and, upon a hearing of the cause, the trial court held the bequest to be valid, and declared that "The General Convention of the New Jerusalem Church in the United States of America" was the intended beneficiary, and so decreed.

From that decree this appeal was taken by some of the heirs of the testatrix, who were also legatees under the will. Their right to appeal is denied on several grounds which will now be considered.

The first is, that the appellants would have no interest in the property disposed of by the residuary clause of the will, even if it were held to be invalid, but that it would pass as personal estate to the husband of the testatrix.

By the fifteenth clause of the will the executors were authorized to sell the real estate of the testatrix, or any part thereof, wherever situated, and to execute deeds therefor, and do all things, by converting the estate into money or otherwise, which might be necessary to carry into effect the provisions of the will.

It is apparent that the purpose for which the executors were

authorized to sell the real estate or any part thereof was to carry into effect the provisions of the will, and that the testatrix directed its conversion into money in order that it might be applied conveniently in the manner directed by the will and for no other purpose. "For," as is said by Mr. Jarman, "every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of the purposes, to prevail as between the persons on whom the law casts the real and personal estate; ⁵⁶² namely, the heir and the distributee": 1 Jarman on Wills, 5th Bigelow's Am. ed., top p. 624. And it seems to be established by the weight of authority that, where a testator directs his real estate to be sold, and the mixed fund arising from the proceeds of the realty and personalty to be applied to certain specified purposes, if any part of the disposition fails, either because void ab initio or by lapse, then in proportion to the extent or amount which the real estate would have contributed to that disposition, the proceeds thereof retain the quality of real estate for the benefit of the heir, although the real estate has been in fact sold, and the money when paid over to the heir, has in his hands the character of money and no longer the character of real estate: *Bective v. Hodgson*, 10 H. L. Cas. 656, 666, 667 (Lord Chancellor Westbury); *Shallcross v. Wright*, 12 Beav. 505, 508; 1 Williams on Executors, 7th Am. ed., 787; Jarman on Wills, 5th Bigelow's Am. ed., 632; *Gallagher v. Rowan*, 86 Va. 823, 825. This objection cannot be sustained.

Although the appellants accepted payment of the bequests made to them in the will with full knowledge of all the facts, they are not estopped, as the appellees insist, from attacking the validity of the residuary clause, on the ground that having elected to take under the will they are bound to give full effect to all its provisions, and to renounce every right inconsistent with it. The provisions of the will were not such as to require an election on the part of the appellants.

The testatrix did not attempt to dispose of any property right of the appellants. There was nothing, therefore, for them to elect to give up in lieu of what she bequeathed them: 1 Pomeroy's Equity Jurisprudence, sec. 472; 2 Williams on Executors, 7th Am. ed., top p. 767; 1 Jarman on Wills, 5th Bigelow's Am. ed., 443, 451; 2 Redfield on Wills, 3d ed., side p. 352.

The authorities cited to show that this was a case for elec-

tion ⁵⁶³ were cases where the legatee had taken his legacy with a condition annexed, and, as Mr. Pomeroy says, were not properly cases of election: 1 Pomeroy's Equity Jurisprudence, sec. 483. In such cases, if the condition annexed is one that is operative and the legatee accepts the legacy, he is, of course, estopped by his own act from afterward insisting on rights which by the terms of the condition he is bound to release, or from declining a duty which he is thereby required to perform: 2 Jarman on Wills, 60.

This brings us to the consideration of the next and last ground of objection to the right of appellants to maintain this appeal.

By a codicil to the will it is provided that any legatee who attempts to set aside the will, or any part thereof, or to cause litigation over it, shall forfeit his legacy, and that it shall revert to the estate. The appellants accepted payment of their legacies. By this act they are estopped, appellees insist, from questioning the validity of the will, or any part of it.

Conditions relating to marriage and disputing a will, when annexed to bequests of personal estate, where there is no gift over upon breach of such condition, are generally considered as in terrorem merely, and inoperative. This in terrorem doctrine, which is only admitted in these two classes of cases (2 Jarman on Wills, 60), although not based upon any satisfactory reason, was firmly fixed in the law of England at an early day: 2 Jarman on Wills, 45, 58, et seq.; 2 Williams on Executors, 585, 586; 2 Pomeroy's Equity Jurisprudence, sec. 933; 1 Lomax's Digest, 2d ed., 341; 2 Minor's Institutes, 4th ed., 286, 287; Scott v. Tyler, 2 Lead. Cas. Eq., 429, et seq., and notes. In this state, in the case of Maddox v. Maddox, 11 Gratt. 804, where the condition related to marriage, the doctrine was applied without being questioned by the court: See, also, the case of Phillips v. Ferguson, 85 Va. 509, 513; 17 Am. St. Rep. 78. It must, therefore, be regarded as settled that such conditions are ⁵⁶⁴ merely in terrorem, and inoperative, when annexed to bequests of personal estate, where there is no gift over upon breach of the condition.

I was inclined to the opinion at first that the direction in the will that the legacies should revert to the estate of the testatrix upon breach of the condition was such a giving over, when considered in connection with the residuary clause, as would render the condition operative, but a more careful examination of the authorities satisfies me that such is not the case: Maddox v. Maddox, 11 Gratt. 804, 810, and cases cited;

1 Roper on Legacies, marg. p. 796; 2 Lomax on Executors, top p. 155. None of the objections made to the right of the appellants to take this appeal can be sustained.

The question whether the residuary clause of the will is valid or not will not be considered. Its validity is attacked upon the ground that the trust created by it is so vague and indefinite that it cannot be enforced by a court of equity. This is denied by the appellees, who insist (and the trial court so held) that the bequest was intended for "The General Convention of the New Jerusalem in the United States of America," a corporation chartered under the laws of the state of Illinois, and for purposes within its corporate powers. Parol evidence was taken to show that the corporation named was the intended beneficiary. That evidence is objected to because it is claimed that there was no such ambiguity in the will as rendered parol evidence admissible to show the intention of the testator. That objection was not made to the court below, and it is insisted that it is too late to make it here for the first time. In the view we take of the case it is unnecessary to pass upon either of those questions.

Prior to 1861 a large portion of that body of Christians known as the New Jerusalem Church was accustomed to meet annually in convention. Those conventions were not incorporated. ⁵⁶⁵ In the year 1861, recognizing the desirability and necessity for an agency of the church at large, whereby money and property contributed by those who had the interests of the church at heart could be held and controlled, the corporation named was organized. Its charter gives it the "power to receive and take by gift, purchase, devise, or otherwise, property and estate, real, personal, or mixed, for educational or religious purposes, and to hold, lease, and sell or convey the same at pleasure." It is not contended (but denied) by the appellees that this was an incorporation of the New Jerusalem Church. The claim is, that it is the general agency and legal representative body of the church to take, hold, and dispose of property for educational and religious purposes. This is not a case where there has been some slight misdescription in the corporate name of the testator's bounty, where parol evidence is admissible within certain limitations to identify the legatees, but it is a case where the object of his bounty, although a voluntary association, is correctly described in the bequest, and the general agency of the association claims that the bequest was intended for it.

The parol evidence, it is true, shows that testatrix on several occasions attended the annual meetings of the general convention, et cetera, which was the representative body of the New Jerusalem Church, and that the trustees named were members of the "executive committee" or "general council" of the general convention, as well as ministers in the New Jerusalem Church, but there is no evidence that the testatrix knew that the general convention, et cetera, was an incorporated body with power to take and hold property for the church, or that she knew that the trustees were members of the "executive committee" or "general council" of the corporation. On the contrary, it appears that she had a personal acquaintance with each of the trustees; one of them, the Rev. Mr. Ager, was for some time treasurer of the New York association of the New Jerusalem Church, and for a number of years she ⁵⁶⁶ was a subscriber to a fund in his hands for missionary work in New York city, and vicinity; the other, the Rev. Mr. Seward, was at one time president of the Ohio Urbana University, an educational institution of the New Jerusalem Church, and whilst he was president she had contributed generously to it.

The omission to name the corporation claiming the fund, or to devote the bequest specially to the purposes (viz., educational and religious) for which it was authorized to take and hold property, and leaving the administration of it entirely to the discretion of the trustees named would seem to show clearly that the testatrix either did not know that "The General Convention of the New Jerusalem, etc.," was the agency or representative of the church to take and hold property for it, or if she did know it, that she did not desire to leave her gift to that corporation to be administered by it, but preferred an agency of her own selection. The terms of the bequest itself show that it was her intention that the fund given should be managed by the trustees named, "or the survivors of them and whosoever they shall select in case of their death." Her confidence in the integrity and wisdom of the trustees selected (through whom she had theretofore made donations for the benefit of the church) was such that she directed that no bond should be required of them, and gave them absolute discretion to administer the fund as they deemed best for the benefit of the church of which she was a member.

In the case of *Wheeler v. Smith*, 9 How. 55, where the bequest was made to the trustees for such purposes as they considered might prove to be most beneficial to the town and trade

of Alexandria, it was argued, as here, that the testator intended to give the town of Alexandria, in its corporate capacity, the residue of his estate; but the court in passing upon that question, Mr. Justice McLean delivering the opinion, said the testator did not so express himself. "On the contrary ⁵⁶⁷ it clearly appears that the executors [trustees] were made the representatives of his confidence, and the only persons who were authorized to administer the trust."

There is nothing in the will nor in the extrinsic evidence which shows that the corporation claiming the bequest was intended to be either the beneficiary, or the agency by which it was to be administered. The bequest must, therefore, be considered as made for the benefit of a voluntary association, and not to or for the benefit of a corporation.

Is the trust so vague and indefinite that it cannot be enforced by a court of equity? If so, it must be held invalid. Trustees are named, but the beneficiaries are uncertain. Is the trust for the benefit of all the members of that church, where-soever they may be, in this and other countries, or is it limited to those in the United States, or to such as live in this state where the testatrix had her domicile, or to those in the state of New York where the trustees reside? The purposes of the trust are wholly undefined, and the discretion vested in the trustees unlimited, except that the fund must be used for the benefit of the New Jerusalem Church. If the trustees are unable, or for any reason fail to act, it is difficult to see how a court of equity could enforce it. It could not well control their discretion, or exercise the power conferred in their place or stead.

The bequest in this case is as indefinite as that in the case of *Wheeler v. Smith*, 9 How. 55, and in reference to which Justice McLean said: "Under this devise how can a court of chancery correct an abuse of the trust? By what means shall it ascertain the misapplication of the fund? There is nothing to restrain the discretion of the trustees, or to guide the judgment of the court. If the trust can be administered, it must be administered at the will of the trustees, free from all legal obligation." Again he says: "How can a court of chancery administer the trust? On what ground can it remove the trustees for an abuse of it? The discretion of the ⁵⁶⁸ trustees may be exercised without limitation, excepting that the fund must be applied for the benefit of the town and trade of Alexandria. And, if the application of the fund be ever so remotely connected with the objects of the trust, the judgment of the court could

not be substituted for the discretion of the trustees. It is doubtful whether so vague a trust could be administered under 43 Elizabeth. Without the application of the doctrine of cy pres it could not be carried into effect."

The decisions in the cases of the Protestant Episcopal Education Soc. v. Churchman, 80 Va. 718, and of Trustees v. Guthrie, 86 Va. 125, are relied on to sustain the validity of this bequest. There was no such question involved in either of those cases as is involved in this.

In the Churchman case the question for decision was whether a bequest to "The Trustees of the Protestant Episcopal Educational Society of Virginia," which was to be used exclusively for educating poor young men for the Episcopal ministry upon the basis of evangelical principles as now established, was valid.

In the Guthrie case the question was whether a bequest to the secretary of the board of foreign missions of the Presbyterian church in the United States was invalid.

The record in each case showed, in the opinion of the court, that the bequest was to a corporation, and for purposes within the scope of its corporate powers and duties, and distinctly defined. In those cases the beneficiaries were certain, the purposes of the trust clearly defined, and within the corporate powers of the legatees. In this case, as we have seen, the beneficiaries are uncertain, the purposes of the trust wholly undefined, and the discretion of the trustees practically without limit.

It is not contended that this bequest could be held valid under the decisions of this court prior to Protestant Episcopal Education Soc. v. Churchman, 80 Va. 718. Those decisions, however, it is claimed, overturned ⁵⁶⁰ the case of Gallego v. Attorney General, 3 Leigh, 487, 24 Am. Dec. 650, and all the numerous cases since decided which recognize and reiterate the principles of that case, except in so far as they had been changed by the legislature. It is true that there is much in the reasoning of the judge who delivered the opinion of the court in those cases to sustain that contention, and that the opinions disapprove those decisions, but there was no necessity for any expression of opinion upon the subject. The opinion in the Churchman case expressly states that "the law which must govern this case is found in sections 2 to 10 of chapter 77 of the code of 1873, especially the second section," and holds that under those provisions of the code the bequests in that case were valid: See Code 1873, pp. 759-761. So far as the decision of that case was concerned, it was a matter of no consequence what

the jurisdiction of a court of chancery was at common law, or under 43 Elizabeth. This is admitted in the opinion when it comes to discuss those questions. The judge says: "In entering upon this inquiry [the jurisdiction of courts of equity over charities at common law], one of grave public importance, it becomes proper to review the doctrine laid down in *Gallego v. Attorney General*, 3 Leigh, 487; 24 Am. Dec. 650. This, however, will not be done because it is essential to a proper determination of the question involved, but because that case is confidently relied on as governing this case and because public interests demand that the doctrine laid down in that and certain later cases the same way should be definitely settled, at least in so far as it is affected by legislation subsequent to that decision."

In the case of *Trustees v. Guthrie*, 86 Va. 125, the court held that the beneficiary in the bequest the validity of which was attacked was not uncertain and unknown as claimed, but was a corporation chartered under the laws of the state of North Carolina, and that the purposes of the bequests were within the powers and duties of the corporation. Having determined that the beneficiary was certain and the purposes of the trust ⁵⁷⁰ within the corporate powers and duties of the beneficiary, there was no necessity for deciding what the law would have been if the beneficiary had been uncertain and the trust undefined, and this seems to have been the position of the judge delivering the opinion, for he says, after having disposed of that question: "And this being the only question raised by the pleadings and evidence in the cause, the case might appropriately end at this point, with a decree reversing the decree of the court below and establishing the validity of the bequest. But in the argument here new propositions are advanced, and they are both novel and untenable."

It is evident that in both these cases so much of the opinions as discussed the jurisdiction of courts of chancery over charities at common law, how far, if at all, 43 Elizabeth was in force in this state, and the decisions in *Gallego v. Attorney General*, 3 Leigh, 487, 24 Am. Dec. 650, and the cases which followed it and recognized and reiterated the principles of that case as to indefinite charities, except so far as they had been changed by the legislature, were wholly unnecessary to the decision of those cases, and therefore must be regarded as mere obiter, and not binding as precedents upon this court. Their dicta announce views contrary to a long line of decisions of very able judges,

and although their decisions may have been based upon erroneous views as to the powers of courts of chancery over charities at common law, and as to the extent to which the statute of 43 Elizabeth had been or was in force in this state, still those decisions have settled the law upon the subject, except as changed by the legislature from time to time.

We are unwilling to hold that this line of decisions, running back over a period of more than fifty years, was overturned by expressions of opinion in *Protestant Episcopal Education Soc. v. Churchman*, 80 Va. 718, and *Trustees v. Guthrie*, 86 Va. 125, not necessary to their decision. If further changes are necessary or desirable upon the subject, the legislature, the law-making power, and not the courts, should make them.

⁵⁷¹ We are of opinion, therefore, that the residuary clause of the will of the testatrix is void for uncertainty, and that she died intestate as to the property which she attempted to dispose of by it; that the decrees appealed from, so far as they held that clause to be valid and directed the fund embraced in it to be paid over to the trustees named therein, should be reversed, and the cause remanded to the court of law and chancery of the city of Norfolk, with direction to distribute the fund between the heirs and the distributees of the testatrix, giving the heirs such proportion of the fund as the real estate bore to her whole estate, and to the distributee such proportion as the personal estate bore to her whole estate.

We regret that we have been compelled to hold this bequest invalid, for it is always painful to see the cherished and praiseworthy wishes of a testator disappointed.

WILLS—EQUITABLE CONVERSION—ILLEGALITY OF OBJECT.—Where the object of the conversion fails, either wholly or in part, whether such failure be occasioned by the incapacity of the devisee or legatee to take, or because of the illegality of the disposition attempted to be made of the converted property, there will be a resulting use or trust or estate in the property, or in so much thereof as is not legally or effectually disposed of, in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will: See monographic note to *Ford v. Ford*, 5 Am. St. Rep. 146, 147.

WILLS—ESTOPPEL TO CONTEST—ACCEPTING LEGACY.—One who receives a legacy under a will is estopped from contesting the validity of the will without repaying the amount of the legacy or bringing the money into court: *Holt v. Rice*, 54 N. H. 398; 20 Am. Rep. 138. See *Ratliff v. Baldwin*, 29 Ind. 16; 92 Am. Dec. 330.

WILLS—CONDITIONS AGAINST OPPOSING.—The law relating to conditions in a will imposing forfeiture of benefits thereunder upon contestants is in a state of confusion both in England and America. The proper test of their validity is probably as laid down in the principal case: See extended note to *Mallet v. Smith*, 60 Am.

Dec. 113-115; *Bradford v. Bradford*, 19 Ohio St. 546; 2 Am. Rep. 419; *Holt v. Holt*, 42 N. J. Eq. 388; 59 Am. Rep. 43, and note.

Of the Certainty and Unity Required in Charitable Trusts.

In the note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 248, we considered the question of what are charitable uses and trusts, and do not desire here to add any further to the enumeration there given, nor to supply other tests to aid in the determination of whether or not a trust is charitable within the meaning of the law. It is not sufficient to sustain a disposition of property, whether made by deed or will, as a charitable use or trust, to show that the purpose may be charitable or that the trustees may so dispose of the fund committed to them that it shall be wholly or partly devoted to charity. It must, as we understand the decisions upon this subject, or at least, a decided preponderance of them, appear from the instrument creating the trust and prescribing the duties of the trustees that they cannot dispose of the property, or any part of it, except for charitable purposes without acting in contravention of the trust. Hence, in every such trust there must be certainty respecting both the beneficiaries of the trust and the nature of the benefit they are to receive under it. This does not require that the beneficiaries shall be specifically named, nor, indeed, that they shall be so designated that every person belonging to the class may call upon a court to compel the trustees to award him some benefit under it, nor, in many of the states, need the trust or the instrument creating it so limit or control the discretion of the trustees, as between purposes all of which are confessedly charitable, that they may not prefer one to another; but we think it is undoubtedly essential to every valid charitable trust that the instrument creating it must so express its purposes as to necessarily inhibit the trustees from devoting any portion of the property to a purpose not charitable. While the trust may embrace more than one purpose, or give the trustees a discretion not restricted to a single purpose, yet it must appear that they cannot, to any extent, employ any part of a fund for a purpose not wholly charitable.

The decisions respecting charitable uses, and particularly with respect to the definiteness with which they must be expressed in the instrument creating the trust, are numerous, and we may concede them to be somewhat conflicting. We think, however, the propositions which we shall herein state are sustained by the very decided weight of authority, both English and American. One proposition, however, so far as we have observed, is not involved in controversy, and this is, that it must appear that the purpose is such that the court can construe it to be wholly charitable, and if, without violating the terms of the instrument creating the trust, the trustees may devote the property, or any part thereof, to a purpose not charitable, the whole trust scheme fails, and the property descends to the heirs at law: *Estate of Hinckley*, 58 Cal. 509; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; *Gambel v. Trippe*, 75 Md. 252; 32 Am. St. Rep. 388; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; *Pell v. Mercer*, 14 R. I. 412. Hence the following trusts have

been held void, because some of the objects thereof were not, in contemplation of law, charitable, to wit: a trust for benevolent and charitable uses: *People v. Powers*, 147 N. Y. 104; for charitable and philanthropic purposes: *In re McDuff* (1896), L. R. 2 Ch. 431; *Ellis v. Selby*, 1 Mylne & C. 286; for charity and hospitality: *Hewitt v. Hudspeth*, 49 L. T., N. S., 587; for charitable or benevolent purposes: *Leavers v. Clayton*, L. R. 8 Ch. Div. 584; for some charitable purpose, preference being given to something of an educational nature: *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 107; for the support of the ministry, repairs of the church, or such other benevolent objects as may be designated from time to time by the church in its legal action as a church: *Jones v. Greene* (Tenn.), 36 S. W. Rep. 729; to use and appropriate property for such religious and charitable purposes as the trustees shall, in their discretion, think most beneficial: *Williams v. Kershaw*, 5 Clark & F. 111; to dispose of property to such objects of benevolence and liberality as the trustee, in his discretion, should most approve of: *Morice v. Bishop of Durham*, 9 Ves. 399; "for the education of young men for the priesthood, or to educate individual orphan boys or girls": *Brennan v. Winkler*, 37 S. C. 457; a bequest to the "orthodox Protestant clergymen of Delphi and their successors, to be expended in the education of colored children, both male and female, in such a manner as they may deem best, of which a majority of them shall determine": *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; an authorization to the testator's executrix "to disburse from my estate, to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars": *Bristol v. Bristol*, 53 Conn. 242; a gift of a fund to trustees, to be laid out by them, with the concurrence of persons described in the will, in forming a museum at Shakespeare's house and for such other purposes as the trustees, in their discretion, should think fit: *Thomson v. Shakespeare*, 1 De Gex, F. & J. 399; 1 Johns. 612; a bequest of a fund to trustees to be kept and applied to such charitable and other purposes as they and the survivors of them should think fit, without being accountable to any person or persons whomsoever for their disposition thereof: *Ellis v. Selby*, 1 Mylne & C. 289; a devise of land to be sold and conveyed by trustees as they should think fit, and the proceeds to safely invest and the income thereof and the principal, from time to time, to expend solely for benevolent purposes in their discretion: *Chamberlain v. Stearns*, 111 Mass. 267; a bequest to the testator's executors in trust, to dispose of at their pleasure, either for charitable or public purposes, or to any person or persons in such shares as they, in their discretion, should think fit: *Vezey v. Jamson*, 1 Sim. & S. 69; a bequest of property to be converted into money, to be by the trustees "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever": *Kendall v. Granger*, 5 Beav. 300; a bequest of property to trustees "upon trusts to dispose of the same at such times and in

such manner and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion": *Fowler v. Garlike*, 1 Russ. & M. 232.

It is not sufficient that the purpose of the trust is or may be charitable, but the trust scheme must be so far developed in the instrument creating the trust that the courts, in case the trustee should refuse to act, or should attempt to abuse the trust, may interpose and determine: 1. What class or classes of persons are entitled to its benefits; and 2. What are the benefits to be by them received thereunder? "If there is such uncertainty as that it cannot be known who is to take as beneficiary, the trust is void, and the heir, by operation of law, will take the estate stripped the trust": *Le Page v. McNamara*, 5 Iowa, 124; *Moran v. Moran*, 104 Iowa, 216. The purpose of the trust must appear from the instrument creating it: *Wheeler v. Smith*, 9 How. U. S. 55; and if the gifts conferred by that instrument are merely for such uses as the trustees see fit, or to such persons as they see fit, these gifts have no element of charity in them that the court can administer, and the trust, therefore, must be regarded as void: *Fowler v. Garlike*, 1 Russ. & M. 232; *Nash v. Morley*, 5 Beav. 182; *Gibbs v. Ramsey*, 2 Ves. & B. 295. A trust must be of such a character that it can be under the control of the court, so that its administration can be reviewed by the court, or, if the trustee himself dies, the court may execute it: *Isaacs v. Emery*, 64 Md. 337; *Church Extension v. Smith*, 56 Md. 397; *Barnum v. Mayor*, 62 Md. 292; 50 Am. Rep. 219; *Gambel v. Trippe*, 75 Md. 252; 32 Am. St. Rep. 388; *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 107; *In re McDuff* (1896), L. R. 2 Ch. 431. Where the trust is not capable of being enforced by judicial decree, it must be disregarded as void, though there are trustees in being willing to undertake its execution: *People v. Powers*, 147 N. Y. 104; *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487; *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420. Hence a bequest of funds to a bishop, to be used by him for the benefit and behalf of a designated church, and another sum to be used and applied for masses for the repose of the testator's soul and of the souls of other persons designated in the will, were both declared to be void for indefiniteness and uncertainty: *McHugh v. McCole*, 97 Wis. 166; 65 Am. St. Rep.

There are, certainly, decisions which we are unable to reconcile with the rule stated by us, to the effect that a trust for benevolent and charitable purposes is not sustainable, because some portion or the whole of the fund may be devoted to a purpose which, though benevolent, is not charitable. These decisions do not, so far as we are aware, question the rule that the purpose of a trust must be wholly charitable, but they insist that the use of the word "benevolent" in connection with the word "charitable," or with some other language employed in the instrument creating the trust, sufficiently indicated that the purpose of the donor was to create a trust wholly charitable: *Tappan's Appeal*, 52 Conn. 412; *Fox v. Gibbs*, 86 Me. 87; *Saltonstall v. Sanders*, 11 Allen, 446; *Fairchild v. Edson*, 5 Misc. Rep. 451; 25 N. Y. Supp. 939; *People v. Powers*, 8 Misc. Rep. 629; 29 N. Y. Supp. 950; reversed, 147 N. Y. 104.

It is doubtless not necessary in all of the states that the instrument creating the trust should describe its objects, or the means to be pursued in attaining them, with such minuteness as to constitute a complete guide to the trustees in discharging the functions of their office. Provided it be clear that the purpose is whole and indisputably charitable, the trustees may, according to many of the decisions, be given a discretion to the extent of permitting them to select the purpose to which the fund may be devoted and the persons to whom its benefits may be accorded. Thus money or property may be given to trustees to divide among the charitable institutions of a designated locality or country: *Tichenor v. Brewer*, 98 Ky. 349; *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226; *Powell v. Hatch*, 100 Mo. 592; *Dolan v. McDermott*, L. R. 5 Eq. 60; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550; *Pocock v. Attorney General*, L. R. 3 Ch. Div. 342; *Lewis v. Allenby*, L. R. 10 Eq. 668; or to be used for the benefit of the poor churches of a city: *McAllister v. Burgers*, 161 Mass. 269; or may be given to a church to be applied to foreign missions: *Kinney v. Kinney*, 86 Ky. 610; or to its Sunday-schools: *Eutaw Place Baptist Church v. Shively*, 67 Md. 493; 1 Am. St. Rep. 412; or to parish schools: *Hanson v. Little Sisters*, 79 Md. 434; but a trust cannot be sustained if the only direction is to apply the property or its income to such charitable or benevolent purpose as the trustees may agree upon: *Leavers v. Clayton*, L. R. 8 Ch. Div. 584.

The beneficiaries may be described as a class in such a mode that the trustees may sometimes be required to exercise some judgment or discretion to determine what persons belong to the class, and, more often, to whom of the many persons belonging to the class the bounty of the donor ought be extended. In these cases, though it is rarely possible for a court to interfere to compel the trustees to extend a benefit to any particular person, there being a large number belonging to the class, it can, at least, restrain the granting of the bounty to persons who are not entitled thereto because not within the class, and may proceed against the trustees as for a violation of their trust if they award its benefits to persons not entitled thereto. Trusts in favor of the poor or indigent people of a town or other locality: *Tappan's Appeal*, 52 Conn. 412; *Sheldon v. Stockbridge*, 67 Vt. 299; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278; or to maintain a home for the destitute and friendless: *Woodruff v. Marsh*, 63 Conn. 125; 38 Am. St. Rep. 346; for the poor of a designated church: *Conklin v. Davis*, 63 Conn. 377; or for the patients in a hospital for the insane: *Hayden v. Connecticut Hospital*, 64 Conn. 320; or for the worthy poor of a town, excluding the colored, the indolent, and the lazy, to be used in supplying them with food and clothing: *Strong's Appeal*, 68 Conn. 527; or for the poor and needy of a town who are dependent upon their own labor for a livelihood: *Phillips v. Harrow*, 93 Iowa. 92; or for the benefit of the inhabitants of a locality for educational purposes: *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502; or for a home and a place of maintenance and education of poor children; *Barkley v. Donnelly*, 112 Mo. 561; or to a church for the tuition of poor chil-

dren: *Dye v. Beaver Creek Church*, 38 S. C. 444; 59 Am. St. Rep. 724; or for a fund to be used as prizes for works of art: *Almy v. Jones*, 17 R. I. 265; or medical essays: *Palmer v. Union Bank*, 17 R. I. 627; or to a designated church for the purpose of advancing and propagating the Christian religion through its agency: *Penoyer v. Wadhams*, 20 Or. 274; or to help in spreading the preaching of the Gospel so long as such is kept up as at present: *King v. Grant*, 55 Conn. 166; or for the creation of a fund for the education of two young men for all time for the Christian ministry: *Field v. Drew Theological Seminary*, 41 Fed. Rep. 371—all are clearly sustainable as charitable trusts, for, though the trustees may have some discretion in selecting the particular objects of the testator's bounty or the particular persons whom they will aid with it, yet the persons selected must belong to a class sufficiently designated in the instrument creating the trust, and the purpose sought in aiding them is designated with equal certainty and falls within the purposes which must confessedly be claimed as charitable.

There are many cases, however, which refuse to permit trustees to be invested with a discretion as ample as that which we have herein shown to be sustainable by the authorities. Thus it may, perhaps, be fairly said of the decisions in New York and several other states that they permit trustees no authority to select the beneficiaries, or to determine the nature of the charity, or the use which will be made of the property intrusted to such trustees; and the cases in New York insist that the beneficiaries must always be so designated that they may demand the execution of the trust: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Levy v. Levy*, 33 N. Y. 107. Nor must there be any indefiniteness or ambiguity about what they are entitled thus to demand. The trustees cannot be left with discretion to determine who shall be beneficiaries. What is known as the Tilden Will Trust is a leading case upon this subject, and involved the construction and validity of the will of the late Samuel J. Tilden. Among other powers which he sought to give his trustees was that of promoting such scientific and educational objects as they should designate. The will, in other respects, gave the trustees a very ample discretion to determine what they should do, and when and where they should do it. The court said, among other things: "As the selection of the objects of the trust was delegated absolutely to trustees, there is no person or corporation that could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect of the will. The will of the trustees is made controlling, and not the will of the testator": *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487. "The question," said the supreme court of Tennessee, "is whether there is anyone who can demand the execution of the trust because made for him, or for a class of which he is a member": *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 107.

Having stated the general principle that a charitable trust must be certain, both as to the persons entitled to share in its benefits,

and as to the precise charity or benefit which shall be extended to them, we can do no more than refer to a large number of cases in which the courts have declared attempted creations of charitable trusts to be ineffective for want of definiteness, either in the thing to be done, or the person or class of persons for whom it is to be done: A trust "for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls": *Brennan v. Winkler*, 37 S. C. 457; a bequest for the poor of a designated city: *Estate of Hoffen*, 70 Wis. 522; of a fund to keep an open house for the entertainment of ministers and others traveling in the service of truth: *Kelly v. Nichols*, 18 R. I. 62; for the support of the poor of the town: *Fosdick v. Hempstead*, 125 N. Y. 581; of moneys to be disposed of among charitable institutions or corporations of the town of Rochester in such proportions as the trustees may deem proper: *People v. Powers*, 147 N. Y. 104; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748; *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; for the aid and support of the testator's children and their descendants who may be destitute, and, in the opinion of the trustees, in need of such aid: *Kent v. Dunham*, 142 Mass. 216; 56 Am. Rep. 667; a trust to be distributed to the testator's next of kin who may be needy, in such proportions and at such times as, in the opinion of the trustees, may be best: *Fontaine v. Thompson*, 80 Va. 229; 56 Am. Rep. 588; a trust to keep certain premises as a place of divine worship for the use of the white ministry and white membership of the Methodist Episcopal Church in the United States, subject to the regulation of the general conference of the church: *Trustees v. Jackson Square Church*, 84 Md. 173; *Isaacs v. Emory*, 64 Md. 333; to pay to some Presbyterian institution in the city of Baltimore: *Gambel v. Trippe*, 75 Md. 252; 52 Am. St. Rep. 219; for the express use and benefit of the needy poor of a church organization, to be by the trustees judiciously applied or appropriated to their use until fully expended: *Yingley v. Miller*, 77 Md. 104; a trust to be applied by the trustees, in their best judgment, for charitable and religious purposes, say, for the promotion of the Christian religion without prejudice or regard to sect, and for or toward the relief of the poor and destitute: *Dulany v. Middleton*, 72 Md. 67; bequests of money to be divided among the sisters of charity: *Moran v. Moran*, 104 Iowa. 216; a bequest to the poor of St. Peter's Catholic Church, which is in Barclay street: *Pratt v. Roman Catholic Orphan Asylum*, 20 N. Y. App. Div. 352; a bequest to be used in the support of a Baptist colporteur and missionary in the state of Wisconsin: *Will of Fuller*, 75 Wis. 431; a bequest of money to be held by the testator's wife as agent for the Christian Church of the United States, "to be used in a manner best to promote the interest of said church in the cause of the Lord": *Reeves v. Reeves*, 5 Lea. 650; a bequest of property to be applied in charity according to the best discretion of the trustee: *Schumacker v. Reel*, 61 Mo. 592; a trust of moneys to be disposed of for any and all benevolent purposes that the trustee may see fit: *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; a trust to dispense from the testator's estate to such worthy

persons and objects as the trustee may see proper such sums as it is her pleasure to thus appropriate, not to exceed five thousand dollars: *Bristol v. Bristol*, 53 Conn. 242; a trust for the propagation of the Gospel in foreign lands: *Carpenter v. Miller*, 3 W. Va. 174; 100 Am. Dec. 744; a trust of moneys to be applied according to the discretion of certain societies for the support of indigent and respectable females: *Beekman v. Bonsor*, 23 N. Y. 297; a devise of property to such charitable institutions, and in such proportions, as the executor should choose and designate: *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748. Where a trust was attempted to be created in favor of children of warrant officers of the United States whose fathers were dead, or, contingently, to fatherless children between the ages of twelve and sixteen years of certain Hebrew societies named, and like children of any religious denomination, Jewish or Christian, it was held too indefinite to be sustained, because it was uncertain as to the class who would be beneficiaries, and, even when the class was ascertained, the individuals were in the legal sense indeterminate, because they were not named and could not be ascertained according to any rules of descent or succession, and no court of equity could, therefore, decree the performance of the trust: *Levy v. Levy*, 33 N. Y. 97. Similar conclusions were reached in the case of moneys to be paid to such worthy poor girls as the trustees might select to aid in their education, the trustees having full power as to the amounts to be paid and the time of payment: *Wheelock v. American Tract Soc.*, 109 Mich. 141; 63 Am. St. Rep. 578; and in case of a bequest of property to be divided proportionately between benevolent associations of a city for the benefit of white and colored children, because, in so far as the trust was a benefit to such children, "it could not be enforced in a court of equity, for the objects of it are not definite, and the persons for whose benefit it was intended are uncertain": *Children's Aid Soc. v. Johnston*, 58 Md. 139; a bequest of bonds that the interest thereof might be applied to a certain church annually, for the reason that the direction as to the application and use of the income was too vague and indefinite, and no direction was given as to what the officers of the church should do with the moneys when received, or as to whether they should apply them to charity, to the employment of a minister, to the erection or maintenance of church buildings, or to distribute among the members of the church: *Rhodes v. Rhodes*, 88 Tenn. 643. Where it was insisted that a trust might be carried out because it appeared that the society and the church of which the testator was a member had been in the habit of keeping an open house for the reception of ministers of the faith, and also to make appropriations from its treasury for their traveling expenses and entertainment, the court said that it was not uncommon for religious societies to provide for excursions, picnics, dinners, Christmas gifts, and various other things, and that as the charity in question might, without violating the terms of the will, be administered for the benefit of those who were neither ministers nor in need, the use in question could not be sustained as a charity: *Kelly v. Nichols*, 18 R. I. 61; *Williams v.*

Kershaw, 5 Clark & F. 111. A testator directed the income of his estate to be applied toward "feeding, clothing, and educating the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church in the city of Baltimore." This bequest was held to be too vague and indefinite to be carried into effect, and therefore to be void. The court said: "It is an admitted general principle that a vague bequest, the object of which is indefinite, cannot be established in a court of equity. Is this a bequest of this description? We think it clearly is": *Dashiell v. Attorney General*, 5 Har. & J. 392; 9 Am. Dec. 572. The court, in the case cited from 9 American Decisions, also said that it was "a fatal objection to the validity of the devise that it is not for the benefit of those poor children alone who at the time belonged to the congregation of St. Peter's Church, but of the poor children who should in succession belong to that congregation, and who, not being a corporate body, were incapable of taking in succession. A devise or bequest immediately to an object incapable of taking, or a trust for such an object, stands on no better footing than if it were to a vague and indefinite object, and 'the trustees of St. Peter's Church,' and 'the trustees of St. Peter's School,' and the trustees of Hillsborough School in Caroline county, have clearly neither such a vested right in themselves nor any beneficial interest in the fund." A devise to a city in trust for the relief of indigent poor persons who, from time to time, may reside in a specified ward therein, is fatally vague and indefinite: *Wildermau v. Baltimore*, 8 Md. 551; a bequest to foreign missions and the poor saints is void: *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94. A bequest to indigent, pious young men preparing for the ministry in New Haven is void: *White v. Fiske*, 22 Conn. 31. Also a bequest for a public dispensary for indigent persons, both sick and lame: *Beekman v. Bonsor*, 23 N. Y. 297. A bequest for the purpose "of educating poor orphan children, citizens of the county of Columbia, and if the fund should not be absorbed, then the overplus to be applied to the education of poor children of the county of Columbia," held void: *Beall v. Drane*, 25 Ga. 442; also a bequest to preach the Gospel to the poor: *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160; also a bequest "to be expended in the education of colored children" in such manner as the trustees may deem best: *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690. Property was given to the Roman Catholic bishop of the diocese of La Crosse, with power to sell it and use the proceeds "for the benefit of the Roman Catholic orphans." This bequest was held void for uncertainty, because from the language of the will it was not possible to know what orphans were intended to be benefited, as to whether they were whole or half orphans, or the orphans of parents both of whom were members of the Catholic Church, or one of whose parents only was a member of such church, nor whether the executor was to apportion the fund equally among all the orphans, or to dispense it in his discretion for the benefit of such orphans as might be selected from time to time, and because, as the testator had failed to declare his purpose, he had left his will "so indefinite and vague upon all these material matters, that a court, in order to

execute the trust, is, of necessity, compelled to make a will for him." The court said that where bequests, vague and uncertain as this one, had been sustained, it was under the influence of the doctrine of *cy pres*, which was not applicable in the United States, because it did not involve the exercise of a strictly judicial power: *Heiss v. Murphy*, 40 Wis. 276.

Further illustrations of the rule that a charitable use or trust cannot include any purpose which may permit the fund to be wholly or partly given for or toward something which is not by law recognized as a charity may be found in a gift for the encouragement of the sport of yachting: *In re Nottage* (1895), 2 Ch. 649; a devise of a rent charge to be paid to church wardens for garments to be given to "six old and poor widows of the parish whom they should judge the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public service of the church": *In re Ross' Charity* (1897), 2 Ch. 797; a devise to a Sunday-school to be used in making Christmas presents: *Goodell v. Union Assn.*, 29 N. J. Eq. 32; a bequest to be applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility: *Kendall v. Granger*, 5 Beav. 300; a devise for a private museum: *Thomson v. Shakespear*, 1 De Gex, F. & G. 399; a bequest for the benefit and maintenance of families of the testator's late workmen, at a certain place, and to enable them, or their children, to become apprenticed or to emigrate abroad: *In re Cullimore's Trusts*, 23 I. R. C. L. 18. So a devise to the pastor of a church will not be deemed charitable, because of the nature of his professional character, in the absence of any evidence tending to fasten upon him a trust for either religious or charitable purposes: *Hodnett's Estate*, 154 Pa. St. 485; 35 Am. St. Rep. 851. A trust attempted to be created by a devise of real estate to a Roman Catholic bishop "for the use of his diocese." In holding that this could not be sustained as a charitable trust, the court said: "There must be a direction or trust in the devise for the application of the proceeds to some one or more of the numerous objects which come within the definition of charities as settled by the decisions. Many, but not all, of the objects to which the funds of a diocese are usually devoted may be charitable within the meaning of the act, but there is nothing in the devise requiring the gifts to be devoted to any particular one or more of these objects, and so it is not a gift to a charitable use; and I must refuse the prayer of the petition": *In re McCauley*, 28 Ont. 610. Very similar is the case of *Fifield v. Van Wyck*, 94 Va. 557; ante, p. 745. There the bequest was to certain trustees "for the benefit of the New Jerusalem Church, as they shall deem best." This church was a religious body, and, undoubtedly, if the bequest had been expressed to be for the advancement of its faith or for any other religious purpose, it must have been sustained, but the vice in the language used was that the trustees were not restricted to a religious or any other specific charitable purpose, but could do whatsoever they thought best for the church. In overthrowing the trust, the court said: "The purposes of the trust

are wholly indefinite, and the discretion of the trustees unlimited, except that the fund must be for the benefit of the New Jerusalem Church. If the trustees are unable, or for any reason fail, to act, it is difficult to see how a court of equity could enforce it. It could not well control their discretion or exercise the power conferred in their place instead." A bequest made to the Roman Catholic bishop of Wheeling, West Virginia, and his successor in trust for the use and benefit of a community of the Roman Catholic Church, known as the "Sisters of St. Joseph," was declared void. The court held that as the members of the community were constantly changing, the bequest could not be sustained, unless it could be supported as a gift for charitable uses, but it said: "Here the beneficial interest is given to a religious community, but not declared to be for religious uses. There is nothing in the will to show that aid to the poor, or aid to learning, or aid to religion, or any human object was intended": *Kain v. Gibboney*, 101 U. S. 362. A bequest of a fund to executors to be given to charitable and deserving objects was sustained upon the ground that the objects must be both charitable and deserving, but it was admitted that if the proper construction of the gift was that the trustees might devote the fund to charitable or deserving objects, then it must have failed: *Stone v. Attorney General*, L. R. 28 Ch. Div. 464.

There are cases, however, which we do not know how to reconcile with the generally conceded rules upon this subject and in which, it seems clear to us, the command or direction of the donor to his trustees might have been obeyed without devoting his bounty to purposes exclusively charitable. Thus if trustees are merely directed to use a fund for the benefit of a certain class of persons, and it is obvious that they may be benefited in many ways, and that some of these may not be charitable, it seems clear to us that the gift cannot be sustained as a charitable trust, unless from the whole language of the instrument creating the trust it appears that the benefit that the trustee may extend must necessarily be of a character which the law pronounces charitable. Perhaps, if the language is such as to indicate that the benefit is to be conferred solely upon indigent persons, a duty arises on the part of the trustees to relieve their ordinary necessities, and hence that the purpose may properly be adjudged to be charitable. This view was taken of a bequest to the selectmen of a town of a fund to be used "for the special benefit of worthy, deserving, poor, white, American, Protestant, democratic widows and orphans" residing in the town. The court said: "The beneficiaries must be 'poor.' This word, as used by the testator, includes those who have exhausted all means of support, and are in a condition to require public aid for the supply of their necessities": *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489; 55 Am. Rep. 152.

Property was conveyed to hold "in trust for the widows and orphans of deceased members of the Brotherhood of Locomotive Engineers, and under such rules and regulations as shall be provided by the brotherhood." This trust was sustained, but no assault seems to have been made upon it on the ground that the purposes

of the trust were not definite, and therefore that the fund might be used for purposes other than charitable: *Guilfoil v. Arthur*, 158 Ill. 600. The decisions in Massachusetts are, however, more unquestionably at variance with what we regard as the law upon this subject than are those of any other state. A testator in that state bequeathed certain property to trustees to be appropriated "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths," and giving the trustees "full power, discretion, and authority to appropriate or expend the income or capital in such manner as in their judgment may best promote the objects above mentioned." The court admitted that the question to be determined was whether this bequest was limited to charitable purposes, and held that the aim of the will was the general relief of the poor, and that the word "benevolent," as used in the will, was no more than equivalent to the word "charitable," and that the word "benevolence," as coupled with "charity," had been constantly used in the legislation of Massachusetts to signify purposes strictly charitable, and especially the relief of the poor: *Saltonstall v. Sanders*, 11 Allen, 446, followed in *Weber v. Bryant*, 161 Mass. 400. The former case was followed by that of *Rotch v. Emerson*, 105 Mass. 431, sustaining a bequest to trustees of a sum "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropical purposes at their discretion." The court said: "Other philosophical or philanthropic purposes' indicates that the purposes previously named are not dissimilar in character. We must infer, therefore, that by the 'promotion of agricultural or horticultural improvements,' the testator had in his mind the acquisition and dissemination of knowledge, the study and inculcation of principles affecting those departments of industry, or of sciences relating thereto. On the other hand 'philosophical purposes,' applying the well-known maxim, *Noscitur a sociis*, must be understood as referring to practical and useful sciences, and not to those which are abstract, speculative, or metaphysical merely. 'Philanthropic' is not in itself widely variant from 'charitable.' The rule of interpretation which may restrict 'benevolence' to the sense of a legal charity is equally applicable here." In the same state, a bequest "for the benefit of disabled soldiers who served in the Union army in the late war of Rebellion in the United States, their widows and orphans," was sustained as a charitable bequest: *Holmes v. Coates*, 159 Mass. 226. In New Hampshire, a trust to distribute a residuum among testator's relatives and for benevolent objects in such sums as the trustees should deem best was held valid on the ground that the word "benevolent," as used in the will, was synonymous with "charitable": *Goodale v. Mooney*, 60 N. H. 528; 59 Am. Rep. 334. In Pennsylvania, the residuum of a fund was directed to be "divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors or their successors." Massachusetts and New Hampshire decisions were quoted and followed, and it was said to have been established in an early

decision as the law of the state that, "In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects": *Murphy's Estate*, 184 Pa. St. 310; 63 Am. St. Rep. 802.

It is not sufficient that the purposes of the donor be accurately and adequately expressed and appear to be wholly charitable, if it cannot be known from the instrument creating the trust what persons or class of persons are to be its beneficiaries. A devise was held to be void for uncertainty in its beneficiaries where it directed real property to be sold and the proceeds to be laid out in building convenient places of worship free for the use of all Christians who acknowledge the divinity of Christ and the necessity of spiritual regeneration," because the will was silent as to the places where the churches were to be erected, and no ownership was conferred on any religious congregation, nor any trustees for it, and because a charity for religion cannot be regarded as sufficiently specific wherein no part of the Christian world has any property, legal or equitable, and no one has a right to manage or preserve, the subject of the trust, and where the court would, perhaps be daily called on to regulate the uses of the buildings which the various sects would endeavor to build, each one for himself: *White v. Attorney General*, 4 Ired. Eq. 19; 44 Am. Dec. 92. Where a testator, being a member of the Protestant church, bequeathed certain property to trustees upon the following trusts, to wit: "Five hundred dollars to fence the lot of ground on which the Mt. Pleasant Protestant Church stands and the graveyard belonging thereto, four thousand dollars to purchase a parsonage for the use and benefit of the Mt. Pleasant Protestant Church forever, two hundred and fifty dollars to buy books for the library of the Sunday-school at Union, two hundred and fifty dollars for the library of the Sunday-school at Centreville, Monroe County, West Virginia, two hundred and fifty dollars to establish a Sunday-school in Fairview schoolhouse and providing the same with a library, three hundred dollars for the sole and exclusive use and purposes of the home missions of the Presbyterian Church at Union, West Virginia, forever," all of these bequests were held to be uncertain as to the beneficiaries, and therefore void: *Wilson v. Perry*, 29 W. Va. 169. The following attempts to create charitable trusts have been held void for uncertainty in the beneficiaries thereof: A conveyance of land to be held by trustees "for the benefit of German citizens comprising the neighborhood six miles west of Brenham in the east edge of the Labadie prairie, Washington county, wishing to establish a permanent school to be known as the Harrisburgh Academy": *Nolte v. Meyer*, 79 Tex. 351, directions by a testator that "his executors lay by two thousand dollars to be distributed among needy, poor, and respectable widows," and, if the Roman Catholic chapel should be continued at the time of his death, to pay one thousand dollars toward its support, and if the Roman Catholic congregation should come to the determination to build a chapel in Richmond, to pay three thousand dollars toward its ac-

complishment, and a devise by him of a lot in Richmond to four trustees "upon trusts, to permit all and every person belonging to the Roman Catholic church as members thereof, or professing the Roman Catholic religion and residing in the said city of Richmond at the time of his death, to build a church on the lot for the use of themselves and of all persons of that religion who may hereafter reside in Richmond": *Gallego v. Attorney General*, 3 Leigh, 450; 24 Am. Dec. 650; to executors "for the purpose of aiding persons who may be in distress, and whom they may think I would myself have assisted in such cases, confiding the disposition of the said trust fund entirely to their discretion": *Hill v. Bowman*, 7 Leigh, 650; a bequest of moneys to be held by the trustee as a school fund and the interest to be appropriated toward the payment of the salary of a competent teacher at a schoolhouse which the testator wished to have erected upon a designated tract of land and for the erection of such schoolhouse, accompanied by a direction that no one sect or denomination should have any power or control over the schoolhouse: *Kelly v. Love*, 20 Gratt. 124; a devise of a farm to the people of the United States, or such persons as Congress shall appoint to receive it, in trust "for the sole and only purpose of establishing and maintaining at said farm in Monticello, Virginia, an agricultural school for the purpose of educating as practical farmers' children of the warrant officers of the United States navy whose fathers are dead": *Levy v. Levy*, 33 N. Y. 97; *Commonwealth v. Levy*, 23 Gratt. 21; a bequest of a fund and property so that the rents and profits shall be "appropriated solely for the repairing and keeping in good order Mt. Wood cemetery near the city of Wheeling, and if there be anything of the said income after keeping the said cemetery in good repair, the remainder may be expended in beautifying the same": *Knox v. Knox*, 9 W. Va. 124; a grant of land to trustees upon a trust "to at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying ground, and for no other purpose": *Brown v. Caldwell*, 23 W. Va. 187; 48 Am. Rep. 376; a bequest of a fund for "the education of youths of the Baptist denomination who shall appear promising for the ministry, always giving preference to the descendants of my father's family": *Baptist Assn. v. Hart*, 4 Wheat. 1; a bequest to testator's daughters "to be applied by them in their best judgment as my bequest for charitable and religious purposes, say, for the promotion of the Christian religion without prejudice or regard to sect, and for or toward the relief of the poor and destitute": *Dulany v. Middleton*, 72 Md. 67; a bequest to trustees of moneys "to pay over the whole residue and remaining part of my means and estate to some Presbyterian institution in Baltimore, as they may determine, for charitable and religious purposes: *Gambel v. Trippe*, 75 Md. 253; 32 Am. St. Rep. 338; a bequest to testator's daughter "upon the condition that she pay to the trustees or council of the E. L. Church in Manchester, Carroll county, the sum of three hundred dollars in trust for the express use and benefit of the needy poor of said church or congregation, and to be by them judiciously applied or appropriated to the express use aforesaid

until fully exhausted": *Yingling v. Miller*, 77 Md. 104; a conveyance to trustees "in trust that the said premises shall be used, kept, maintained, and disposed of as a place of divine worship for the use of the white ministry and the white membership of the Methodist Episcopal church in the United States of America, subject to the usages and ministerial appointments of said church and the annual conference in whose bounds said lands are situate": *Trustees v. Jackson Square Church*, 84 Md. 173; *Isaac v. Emery*, 64 Md. 333; a bequest of a sum of money for the purpose of keeping in order a lot and vault of the testatrix, and a bequest of moneys to be used as a part of a perpetual loan fund, such fund consisting of moneys set apart to be loaned to necessitous Methodist churches in the United States: *Church Extension v. Smith*, 56 Md. 362; a bequest to the deacons of a church and their successors in office of a fund to be "funded with good security on improved land, and the interest to be paid annually to the American Baptist Publication Society located at Philadelphia, Pennsylvania, to aid in the support of a Baptist colporteur and missionary in the state of Wisconsin": *Will of Fuller*, 75 Wis. 431; a bequest to a town for the benefit of the poor thereof, not restricted to those for whose support the town is under a statutory liability: *Fosdick v. Hempstead*, 125 N. Y. 581; a bequest of a fund to executors "to be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul, the souls of my family, and also for the souls of all others who may be in purgatory": *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; a bequest of a fund upon a trust to distribute it "to and among such incorporated societies organized under the laws of the state of New York and the state of Maryland having lawful authority to receive and hold funds upon permanent trust for charitable or educational uses as my said executors, the survivors or survivor of them, shall select for that purpose, and in such several sums, not exceeding in any case the amount that such incorporated body is empowered by law to take and hold upon the uses aforesaid, as they, my executors, the survivors or survivor of them, shall determine": *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; a bequest upon trust to dispose of the property "among the charitable and benevolent institutions and corporations of the city of Rochester as he shall choose, in such sums and proportions as he shall deem proper": *People v. Powers*, 147 N. Y. 104; a devise and bequest of all the testator's property "to those members, both brothers and sisters, of the Society of the Most Precious Blood who are under my control and subject to my authority at the time of my death," the aforesaid brothers and sisters "to select trustees to receive the property, to be used in common by all the members of the society and their successors, to be used by the society in an humble and meek way, not in luxury, pride, or self-esteem": *Society of the Most Precious Blood v. Moll*, 51 Minn. 277; a bequest of a fund to trustees "to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that some part of the colored population in each of said

states, Pennsylvania and South Carolina, shall partake of the benefit thereof": *Fontaine v. Ravenell*, 17 How. 369.

In several of the cases cited, the true ground of overthrowing the trust was not that the beneficiaries were not sufficiently designated, but that they consisted of persons so numerous that their designation was regarded as too vague and general. For this reason the courts refused to sustain a trust to buy and distribute such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind: *Brown v. Yeall*, 7 Ves. 50, note; also a trust to pay over property for the benefit of the Methodist Episcopal church in America, to be disposed of by the conference and the members thereof as they, in their godly wisdom, should judge will be most expedient or beneficial for the increase or prosperity of the Gospel: *Holland v. Peck*, 2 Ired Eq. 255; a bequest of moneys to be expended in the education of colored children in such manner as may be deemed best, with the object of promoting the knowledge and religious improvement of the colored race: *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690. On this subject, however, it is difficult, if not impossible, to reconcile the decisions, and we think the better and more correct view is, that though the persons to be benefited constitute a very large number, and may possibly include all mankind, still the trust may be sustained if its purpose is sufficiently designated in the instrument creating it. Therefore a trust for the purpose of extending information of a particular class or of propagating a doctrine upon any particular subject is sustainable, where the purpose has been so expressed by the creator of the trust that it is possible for a court to see that his trustees pursue it: *Jackson v. Phillips*, 14 Allen, 539; *George v. Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754; *Thornton v. Howe*, 31 Beav. 14; *Perry on Trusts*, sec. 705.

Some of the apparent conflict between decisions respecting the certainty required in charitable trusts with respect to the purpose and the beneficiaries may be due to conflicting views taken by different courts respecting the doctrine of cy pres and the extent to which it prevails in the United States. In England, "the general superintendence or administration of all charities was in the king as *parens patriae*." This superintendence or administration was vested in the court of chancery which, in the exercise of it, performed duties, some of which were clearly not of a judicial nature, and are, therefore, not possessed by courts of equity in this country. Thus, in England, if a gift was made for a supposed charitable use, but could not be carried out because its purpose was impossible or contrary to law or public policy, the court of chancery might, in the exercise of the sovereign powers of the king, accept jurisdiction over the property attempted to be donated and apply it to some lawful or possible charity, though entirely different from that contemplated by the donor. This, it is conceded, no court of chancery in this country has authority to do: *Teele v. Bishop of Derry*, 168 Mass. 341; 60 Am. St. Rep. 401; *Perry on Trusts*, sec. 718. A donor may, however, attempt to donate his property to recognized charitable purposes without specifying to which of many purposes equal-

ly charitable it shall be applied, or, if to several of such purposes, what shall be the amounts applied to each. In such circumstances he has clearly manifested an intention to devote his property to charitable purposes, but that intention must wholly fail unless trustees are in some way selected to carry it into effect according to their discretion, or some court assumes jurisdiction over the trust and directs its application to or among the charitable purposes designated by the donor. If the purposes so specified by him were not necessarily charitable, or were partly charitable and partly not charitable, and his trustees might, without violating his trust, devote the whole of the fund, or such part as they thought fit, to purposes not charitable, there was not, even in England, any authority in the courts to assume jurisdiction and require the devotion of the fund to purposes wholly charitable, and hence there had not been created any charitable use or trust within the contemplation of the law, and the property necessarily descended to the donor's heirs. If there is a mere direction in the instrument creating the trust that the fund shall be devoted generally to charitable purposes, and no trustee is selected to provide for its distribution among the various institutions to which it might, with equal propriety, be given, the selection of these institutions, it has been well said, is a ministerial prerogative rather than a judicial act, and the power to make the selection is not vested in courts of chancery in this country, which, it is conceded, possess none but judicial powers: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *McHugh v. McCole*, 97 Wis. 166; 65 Am. St. Rep.; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *McAuley v. Wilson*, 1 Dev. Eq. 276; 18 Am. Dec. 587; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104; *Heiss v. Murphy*, 40 Wis. 276; *Ruth v. Oberbrunner*, 40 Wis. 238; *Will of Fuller*, 75 Wis. 431; *Perry on Trusts*, sec. 719. The donor may, however, appoint trustees, and invest them with discretion to apply the fund toward a charitable purpose specified by him, leaving them, in its application, to select, from numerous persons or institutions, which shall receive the benefit of his bounty, or the testator may specify the charitable purpose in terms so general that the trustees must necessarily exercise a discretion in determining which of many purposes falling within the general description they shall seek to promote or accomplish. In all of these cases, it is clear that no specific or single person, institution, or purpose can be shown to be the object of the testator's bounty to the extent that a court of equity can be called upon to require the fund, or any portion thereof, to be by the trustees given to or for such person, institution, or purpose. In other words, the donor has manifestly never completed the scheme even in his own mind, but has, in effect, delegated its completion to trustees. Whether, in such a case, courts of equity in this country retain authority over the trust, so as to control its administration, and make it certain, and thereby vindicate its claim as a charitable trust, is a question upon which we understand the courts to be irreconcilably divided. Perhaps the majority of them maintain that courts of chancery, as a part of their judicial power, possess authority in cases of this character to so far control

the administration of the trust as to compel trustees to execute it within the limits of the discretion conferred upon them by the donor and in the event of his not having appointed trustees, or of their death after his appointment, to provide trustees by whom the discretion which he has conferred may be exercised, and hence the trust may be sustained: *Church v. Church*, 18 B. Mon. 335; *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417; *Attorney General v. Wallace*, 7 B. Mon. 611; *Tappan v. Deblois*, 45 Me. 122; *Howard v. American etc. Soc.*, 49 Me. 288; *Swasey v. American etc. Soc.* 57 Me. 523; *Universalist Soc. v. Kimball*, 34 Me. 424; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 539; *Attorney General v. Garrison*, 101 Mass. 223; *Minot v. Baker*, 147 Mass. 348; 9 Am. St. Rep. 713; *Wade v. American etc. Soc.*, 7 Smedes & M. 663; 45 Am. Dec. 324; *Chambers v. St. Louis*, 29 Mo. 543; *Missouri Hist. Soc. v. Academy of Science*, 94 Mo. 459; *Urmev v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; *American Bible Soc. v. Marshal*, 15 Ohio St. 537; *Murphy's Estate*, 184 Pa. St. 310; 63 Am. St. Rep. 802. The minority, on the other hand, place charitable trusts very much on the same footing as private trusts with respect to the certainty required in the designation of their purposes and beneficiaries, and insist that where they are not so designated in the instrument creating the trust that the court can determine whether a purpose or a beneficiary in question is entitled to the bounty of the donor or not, then that the trust must fail, unless the court can exercise that portion of the power cy pres pertaining to the prerogative, and as this power does not belong to the American courts, the trust must fail: *Newark etc. Church v. Clark*, 41 Mich. 730; *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487; *Holland v. Peck*, 2 Ired. Eq. 255; *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104; *Gallego v. Attorney General*, 3 Leigh, 450; 24 Am. Dec. 650; *Fisfield v. Van Wyck*, 94 Va. 557; ante, p. 745; *Ruth v. Oberbrunner*, 40 Wis. 238; *Heiss v. Murphy*, 40 Wis. 276; *Will of Fuller*, 75 Wis. 431; *Pack v. Shanklin*, 43 W. Va. 304; *McHugh v. McCole*, 97 Wis. 166; 65 Am. St. Rep.

SIMS v. SIMS.

[94 VIRGINIA, 580.]

FINAL DECREE, WHAT IS.—A decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is final; and, on the other hand, every decree which leaves anything to be done by the court in the cause is interlocutory as between the parties remaining in court.

FINAL DECREE, WHAT IS NOT.—If in a suit by an executor for the construction of a will and the administration of the estate under the direction of the court, and praying that an account be taken of the decedent's debts, the executor's account settled, and the estate distributed among the parties entitled thereto, the court enters a decree referring the cause to commissioners, to take, state, and report an account of the transactions of the executor and also an ac-

count of the debts against the estate, if any, such decree is interlocutory.

WILLS—TRUST, THE TERMS OF WHICH ARE NOT DISCLOSED.—A bequest to W. B. S., "to be disposed of by him as a private trust, about which I shall give him special verbal instructions, but if my afflicted son, J. B. S., who is now an inmate of a lunatic asylum, should die before my death," the legacy to be revoked and the property disposed of as otherwise directed in the will, creates a trust in favor of J. B. S., giving him an absolute equitable estate, which trust cannot be limited or controlled by evidence of parol instructions given by the testator to the trustee.

WILLS.—PAROL EVIDENCE OF DIRECTIONS OR INSTRUCTIONS OF THE TESTATOR referred to, but not incorporated in, a will is not admissible to show what such instructions were.

WILLS—TRUST WITHOUT A KNOWN BENEFICIARY.—If a trust is created by a will, but the beneficiary cannot be discovered from the will itself, the trustee holds for the benefit of the heirs at law or distributees of the testator.

F. M. & C. F. McMullen, Hay & Jeffries, and T. C. Gordon, for the appellant.

Patrick & Gordon, Daniel Harmon, and George Perkins, for the appellee.

581 **RIELY, J.** According to the uniform decisions of this court, a decree which disposes of the whole subject gives all the relief that is contemplated, and leaves nothing to be done by the court, is to be regarded as final; and, on the other hand, every decree which leaves anything to be done by the court in the cause is interlocutory as between the parties remaining in the court: *Cocke v. Gilpin*, 1 Rob. (Va.) 20; *Ryan v. McLeod*, 32 Gratt. 367; *Rawlings v. Rawlings*, 75 Va. 76; *Wright v. Strother*, 76 Va. 857.

Applying this test to the decree of November term, 1893, it cannot be pronounced to be a final, but is an interlocutory decree.

The bill was filed by the executor of the decedent against the legatees for the construction of the will and the administration of the estate under the direction of the court. It prayed that an account be taken of the outstanding debts, that the executorial account be stated and settled, and that the estate be distributed among the parties entitled thereto. The decree referred the cause to one of the commissioners of the court to take, state, and report to the court at its next term an account of the transactions of the executor, and also an account of the debts, if any, against the estate. Such an order is of the very essence of an interlocutory decree: *Templeman v. Steptoe*, 1

Munf. 339; *Barker v. Jenkins*, 84 Va. 899; *Welsh v. Solenberger*, 85 Va. 441. It is difficult to understand how a decree which ordered such accounts to be taken and reported to the court could be considered final. It wholly lacked the characteristics of a final decree. It plainly contemplated and required further action by the court in the cause in order to give the requisite relief. The confirmation by the court of the report of the commissioner was necessary to establish the debts, if any, reported against the estate, to ⁵⁸² give finality to the settlement of the transaction of the executor to determine and settle the shares of the respective legatees, and enable the court to decree the payment thereof. It is true that the decree proceeded to construe the will and declare in what manner the estate should be distributed, but this was simply to decide the principles of the cause as preliminary to the complete relief to be granted.

The decree being interlocutory, it was entirely competent for the committee of John B. Sims, a lunatic, to file his petition in the cause to have the decree reheard, the will of the decedent construed, and the estate distributed in accordance with such construction.

The testator, by the fifth clause of his will, gave one-third of his estate, after deducting the provision made for his widow, to his nephew, W. B. Sims, "to be disposed of by him as a private trust, about which I shall give him specific verbal directions, having full confidence in his honesty to carry out my wishes in regard to this bequest; but if my afflicted son, John B. Sims, who is now an inmate and patient of the Western Lunatic Asylum, should die before my death, then it is my will that this bequest to my said nephew, W. B. Sims, shall be revoked from and after the death of my said son, and the legacy thus conditionally bequeathed to the said W. B. Sims, I give and bequeath to be equally divided between my son, Wilson T. Sims, and his daughter, Sarah Jane Sims, with the same limitations and conditions attached thereto as to the other legacies given to them respectively in this will."

The will, on its face, shows plainly and unequivocally that the bequest to W. B. Sims was a gift to him upon trust. He was not to take any beneficial interest in it, and will not be permitted to enjoy it. It does not, however, disclose the verbal directions upon which he was to administer the trust. As to these, the will is silent, and if they were ever given by the testator, they constitute no part of his will. They were ⁵⁸³ not incorporated into it and parol evidence is inadmissible to show that they were:

Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29; 1 Redfield on Wills, 496-508.

Our statute of wills, except in the case of a soldier in actual military service, or a mariner or seaman at sea, declares, so far as it affects the case before us, that "no will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature": Code, sec. 2514. Each and every part of the last will and testament of a decedent must be in writing, and be executed in the mode prescribed by the statute, and if any part is in parol, such part is void and inoperative, in the absence of fraud. In *Sprinkle v. Hayworth*, 26 Gratt. 392, it was said by Judge Moncure, in delivering the opinion of the court, that the statute of wills "plainly forbids that a parol will, whether in the form of a trust or otherwise shall be set up and established."

An exception to the rule is allowed and enforced in equity where the devisee or legatee has procured an absolute devise or bequest to himself by promising the testator that he would hold it for the benefit of another, and afterward refuses to perform his promise, but claims to hold the property in his own right and for his own benefit. The exception to the rule is allowed upon the ground of the trust resulting from the confidence reposed in him by the testator, and because not to do so would be to permit the devisee or legatee to profit by his own fraud, and in such case to convert the statute of wills into a law for the consummation of fraud, instead of being a law for its prevention: *Pomeroy's Equity Jurisprudence*, sees. 430, 919, 1054; *Sprinkle v. Hayworth*, 26 Gratt. 392; *McCormick v. Grogan*, 4 Eng. & Ir. App. 82; *Towles v. Burton*, Rich. Eq. Cas. 146; 24 Am. Dec. 409; *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52.

⁵⁸⁴ Where a trust is created by a will, if the beneficiary is not disclosed or cannot be discovered from the will itself, the trustee holds the devise or bequest for the benefit of the heirs or distributees of the testator. The equitable interest goes to them by way of a resulting trust: *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29; *Olliffe v. Wells*, 130 Mass. 221; *Lewin on Trusts and Trustees*, marg. p. 75.

But in the case at bar, while the verbal directions of the testator in regard to the trust created by his will are not in writing, and parol evidence is inadmissible to prove them, we are of opinion that the will points out and sufficiently designates the testator's son, John B. Sims, as the sole beneficiary of the trust.

This is plainly and necessarily implied by the direction that if his "afflicted son, John B. Sims, who is now an inmate and patient of the Western Lunatic Asylum, should die before" the testator, the bequest to W. B. Sims should be revoked from and after the death of John B. Sims, and the legacy conditionally bequeathed to W. B. Sims in trust be equally divided between Wilson B. Sims and Sarah Jane Sims, the son and granddaughter of the testator. The testator's afflicted son is clearly the object of his bounty. The trust is to arise if he survive the testator, but is to have no existence if he should die in his lifetime.

The verbal provisions in respect to the trust, whatever they were, being void and inoperative, the bequest was simply a gift to W. B. Sims in trust for John B. Sims, without further specification or directions—a mere naked trust—with the absolute equitable estate in the beneficiary, and the equitable right in him to be put in actual possession and enjoyment of the corpus of the trust: Lewin on Trust and Trustees, marg. p. 21. He had, therefore, the right to have it turned over to him, or rather, being a lunatic, to have it decreed to his committee. This is what was done by the circuit court, and its decree must be affirmed.

FINAL DECREE—WHAT IS.—If, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, it is final; otherwise it is interlocutory: *Arnold v. Sinclair*, 11 Mont. 556; 28 Am. St. Rep. 489, and note. An interlocutory decree is one which leaves for future determination the equity of a case, or some material question connected with it: *Teaff v. Hewitt*, 1 Ohio St. 511; 59 Am. Dec. 634, and note; monographic note to *Williams v. Field*, 60 Am. Dec. 427-439.

WILLS—CONSTRUCTION—PAROL EVIDENCE OF TESTATOR'S INTENTIONS.—Evidence of the intention of a testator, separate and apart from that conveyed by the language used in the will, is not admissible for the purpose of interpreting the will: *Clarke v. Clarke*, 46 S. C. 230; 57 Am. St. Rep. 675, and note; *McCampbell v. McCampbell*, 5 Litt. 92; 15 Am. Dec. 48; *Stoner's Appeal*, 2 Pa. St. 428; 45 Am. Dec. 608, and note.

WILLS—SECRET TRUST—EFFECT OF.—If a will devises or bequeaths property to executors, who are to hold without limitation or condition, but the action of the testatrix is induced by an understanding or promise that the property should be held as a secret trust for religious and charitable societies, the legal title to such property must be regarded as vesting in the executors to be held by them for the next of kin: *Fairchild v. Edson*, 154 N. Y. 199; 61 Am. St. Rep. 609, and note.

PRESTON v. KINDRICK.

[94 VIRGINIA, 760.]

JUDGMENT OR DECREE BASED UPON FALSE RETURN OF SERVICE OF PROCESS—RELIEF FROM IN EQUITY.—Where a false return of the service of process upon which a judgment or decree was based was not procured or induced by the plaintiff, and he is in no way connected therewith, the defendant cannot obtain relief in equity, but is left to his remedy against the officer who has made the false return, except in those instances where relief can be procured by motion in the original action or suit.

JUDGMENTS AND DECREES.—TO OBTAIN RELIEF IN EQUITY AGAINST A JUDGMENT OR DECREE on the ground that the process was not served on the defendant, he must show that he did not have actual notice of the proceeding before the judgment or decree was entered and that he had a meritorious defense.

JUDGMENTS AND DECREES.—RELIEF IN EQUITY WILL NOT BE AWARDED against a judgment or decree on the ground that the complaint in the cause did not warrant it, where the court had jurisdiction of the cause and of the parties.

Daniel Trigg, for the appellant.

J. S. Ashworth, for the appellee.

⁷⁶¹ **BUCHANAN, J.** In the year 1892 the appellant filed his bill in the circuit court of Washington county to subject a parcel of land to the purchase price thereof due from one Bratton, to whom he had sold it. The bill alleged that Bratton had assigned his contract of sale to Mrs. Kindrick, one of the appellees. Both were made parties defendant to the bill. Neither of the defendants appeared, and a decree was entered taking the bill for confessed, in which it was recited that it appeared to the court that all the defendants had been duly served with process. A sale of the land was directed and made, reported to the court, and confirmed. The proceeds of sale were not sufficient to pay the entire purchase money, and a decree was entered against Bratton and Mrs. Kindrick for the residue thereof, and the cause stricken from the docket at the October term of the court, 1892.

In June, 1895, Mrs. Kindrick filed her bill to enjoin the collection of that sum, and also to set aside and annul the decrees under which the land was sold, allow her to pay the purchase money due thereon, and for general relief. The ground upon which she based her right to relief was that she had no notice of the suit or sale, and that the return of the sheriff showing that he had executed process upon her was false, and a fraud upon her, and that the appellant, the plaintiff in that suit, and the purchaser of the land, had notice that she was ignorant of the suit,

and of the proceedings had therein. Preston answered, and denied all notice, as did Naff, to whom Preston had sold the land. The sheriff was made a party, but no answer was filed by him. Answer under oath was waived as to all the defendants. Mrs. Kindrick, whose deposition was objected to, testified that no process was served upon her. No proof was taken to sustain the allegations of her bill that she had no actual knowledge of the suit, or of the proceedings thereon, or that Preston had any knowledge ⁷⁶² that process had not been served upon her, or that he knew that she was ignorant of the suit, or of the proceedings therein, as she alleged.

The circuit court held that no process had been executed upon Mrs. Kindrick, and granted the relief prayed for.

The question involved in this appeal is the right of a party to go into a court of equity to obtain relief against a decree rendered in a cause to which he was made a party, on the ground that no process was served upon him, when the process appears to have been executed by the return of the sheriff, and by the recital in the decree of the court taking the bill for confessed.

The decisions of the court upon this question are conflicting, and the reasoning of the judges is not entirely satisfactory upon either side.

One line of cases holds that a party who had been injured by a judgment rendered in his absence may have relief in equity if he can succeed in showing that he was not summoned, and did not hear of the proceedings in time to make defense or to obtain a new trial, and that he has a meritorious defense: Freeman on Judgments, sec. 495.

Another class of cases holds that a court of equity cannot grant relief in such a case unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception; thus likening the case to those cases in which the defendant has been prevented from setting up his defense by the trickery or fraud of his adversary. The rule of this latter class of cases is perhaps the better doctrine.

The risk of opening a judgment or decree on an allegation which, like that of the failure to serve process, or the want of notice, depends upon the uncertain testimony of witnesses, is so great that the injured party should be left to his remedy in the same case where relief can be had in that case, or to his ⁷⁶³ remedy against the officer who has made the false return, unless that return was in some way procured or induced by the plaintiff,

or he is in some way responsible for the defendant's want of notice of the suit, or of the proceedings therein.

Counsel for the parties have not cited any decision of this court upon this precise point, nor have we, in our examination, been able to find such a case.

In *Goolsby v. St. John*, 25 Gratt. 146, 156, where it did not appear affirmatively from the return that summons had been served in the manner prescribed by law, Judge Moncure said, in discussing that question, that "if the summons had been executed in the manner prescribed by law, and that fact had appeared by the return made thereon by the sheriff, then the judgment would have been conclusive, even though the defendants may not have had actual knowledge of the existence of the action before the judgment was rendered."

Such a judgment is sustained, not because a judgment rendered without notice is good, but because the law will not permit any proof to weigh against that which the policy of the law treats as absolute verity, and remits the party injured to his remedy at law against the person by whom the record was falsified.

The presumption that the powers committed to judicial tribunals of general jurisdiction have been properly exercised is essential to the repose and safety of society, and the inconvenience of allowing it to be met and overcome by parol evidence is greater than any benefit that could be derived from a different course. Public safety demands that when such a tribunal has pronounced judgment its adjudication on that subject shall be as conclusive on the question whether the defendant was duly notified as on any other point essential to the determination of the cause: 1 *Smith's Leading Cases*, 1119, 1127, etc.

This question was before the supreme court of the United States in the case of *Walker v. Robbins*, 14 How. 584, and ⁷⁰⁴ that court held that a bill in chancery would not lie for the purpose of perpetually enjoining a judgment upon the ground that there was a false return in serving process upon one of the defendants. Mr. Justice Catron, in delivering the opinion of the court, said: "Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill in this case be maintained? The respondents did no act that can connect them with the false return. It was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from

controversy. Still the marshal's responsibility does not settle the question made by the bill, which, in general terms, is whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law when there has been an abuse in the various details arising on execution of process, original, mesne, and final. If a court of chancery can be called upon to correct one abuse, so it may to correct another, and, in effect, to vacate judgments, where the tribunal rendering the same would refuse relief, either on motion or on a process by audita querela, where this mode of process is in use. In cases of false return affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made; and, if relief cannot be had there, the party injured must seek his remedy against the marshal."

The same question came before that court again in the case of Knox County v. Harshman, 133 U. S. 152. In delivering the opinion of the court in that case, Mr. Justice Gray said: "The officer's return stated that he served a copy of the summons upon the clerk. If that return were false, no fraud being charged or proved against the petitioner, redress could be sought at law only, and not by this bill."

But, even if it were held that, in order to obtain relief against the proceedings complained of, it was only necessary ⁷⁶⁵ for Mrs. Kindrick to show that process was not served upon her, and that she did not have actual notice of the proceedings before the decrees complained of were entered, and that she has a meritorious defense, she has not made out her case. Although she alleges in her bill that she did not have actual notice of the suit and proceedings therein until after the decrees complained of were rendered, she has wholly failed to sustain it by proof.

It is insisted that the bill in the case of Preston v. Kindrick, et cetera, did not warrant the court in rendering a personal decree against Mrs. Kindrick for the residue of the purchase price of the land remaining unpaid after crediting upon it the proceeds of sale, and that as to this sum the court was clearly without jurisdiction, and its decree is void. Conceding that the pleadings and proof in that case did not authorize a decree against her for that sum, it was a mere error of the court. The court had jurisdiction of the parties and of the subject matter. It did not exceed its jurisdiction in rendering a personal decree against Mrs. Kindrick; it only committed an error, for which relief could have been had under section 3451 of the code—a

remedy which was still available to Mrs. Kindrick when the bill in this case was filed.

We are of opinion that the decree complained of should be reversed, and the bill dismissed.

JUDGMENTS—RELIEF FROM IN EQUITY—FALSE RETURN OF PROCESS.—The better rule is, that an officer's return does not constitute an insuperable objection to granting of relief from a judgment based thereon, though the plaintiff did not know of its falsity. It will be found that the remedy of the defendant by an action against the officer is in most cases inadequate, and we cannot conceive how the plaintiff, by a false return of process, acquires any equity superior, or even equal, to that of the defendant to be relieved against an unjust judgment, the rendition of which is due to no fault of his: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 245. The complainant, however, must show that he had a meritorious defense before equity will relieve him, even though the court pronouncing the judgment against him acted without jurisdiction: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 222, 223, discussing exhaustively the subject of equitable relief from judgments, decrees, and other judicial determinations.

BLAKEMORE v. WISE.

[95 VIRGINIA, 289.]

MARSHALING SECURITIES.—To invoke the doctrine of marshaling securities, both sources of payment must belong to the common debtor. The duty is not invoked against the doubly secured creditor, but against the common debtor, and cannot be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund.

MARSHALING SECURITIES—EFFECT OF RELEASING A LIEN AS TO PART OF THE PROPERTY SUBJECT THERE-TO.—If a judgment creditor has as such a lien covering the debtor's lands and also certain lands which the debtor has sold, such creditor may release the land so sold without impairing his right to assert his judgment lien against all the other lands of the debtor, though at the date of such release junior judgment liens existed against the judgment debtor. The junior judgment creditors have no right to complain of such release, though when it was made the lands released had not been fully paid for and the judgment creditor did not insist that the balance of the purchase price be paid toward the satisfaction of his judgment or of the judgments in favor of the junior judgment creditors.

A JUDGMENT CREDITOR HAS NO LIEN UPON PURCHASE MONEY DUE to a judgment debtor for lands sold by him and which are subject to the judgment lien.

JUDGMENT LIENS.—A JUDGMENT CREDITOR HAS THE RIGHT TO REST UPON HIS LIEN without pursuing the debtor's personal property.

Suit by J. W. Wise on behalf of himself and other lien creditors of J. W. Davies to subject the latter's real estate to the

payment of their liens. Davies was originally the owner of four hundred and twenty acres of land subject to a deed of trust to secure the payment of purchase money. In September, 1890, he conveyed nineteen acres to L. P. Coyner, and in October of the same year, sixty-six acres to Robert Skinner, but the latter did not record his conveyance until March, 1894. In the meantime a judgment had been entered and docketed in favor of the appellant Blakemore. In September, 1894, Skinner conveyed his tract to trustees to secure the payment of a bond for two thousand dollars, and the appellant Blakemore united in this conveyance.

Herring & Herring and George G. Grattan, for the appellant.

Sipe & Harris, Roller & Martz, and T. N. Haas, for the appellees.

271 HARRISON, J. This controversy involves the right to priority between certain judgment lien creditors of J. Walter Davies. A number of subsequent liens are audited, but, in considering the question presented it is only necessary to mention the following judgments: 1. One confessed and docketed February 1, 1894, in favor of the appellant, Harris C. Blakemore; 2. One confessed and docketed July 27, 1894, in favor of the appellee, J. A. Patterson; 3. One confessed and docketed August 10, 1894, in favor of the appellee, J. W. Wise.

These judgments rest as liens upon the following real estate owned by the debtor Davies: 1. A tract of two hundred and twenty-two acres, two rods, and seven poles, upon which there is a prior deed of trust securing unpaid purchase money supposed to amount to the value of the land; 2. A tract of one hundred and twelve acres and twenty-eight poles which is free of encumbrance prior to said judgments.

272 On October 1, 1891, the judgment debtor sold and conveyed sixty-six acres, two rods and thirteen poles of land to one Robert Skinner, who failed to record his deed until March 19, 1894. It thus appears that the judgment in favor of the appellant Blakemore, dated February 1, 1894, attached as a lien to the Skinner land before his deed was recorded, while the judgments in favor of Patterson and Wise respectively were subsequent in time to the recordation of that deed, and bound only the two first-named tracts still owned by Davies.

On September 10, 1894, Robert Skinner borrowed two thousand and eighty dollars, and secured the same by deed of trust on the land bought by him from Davies. In this deed the ap-

pellant, Harris C. Blakemore, united, releasing the lien of his judgment as to the Skinner land.

It is contended that inasmuch as the appellant, Blakemore, held the first judgment lien upon the three tracts of land, and voluntarily released the same as to the Skinner tract, he had thereby limited his security to the prejudice of Patterson and Wise, and should, therefore, be postponed to them to the extent of the value of the property released. The circuit court took this view, and decreed accordingly, and it is from this decree that Blakemore has appealed.

To invoke the doctrine of marshaling securities both sources of payment must belong to the common debtor. The equity is not invoked against the doubly secured creditor, but against the common debtor, and cannot be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice of the creditor entitled to the double fund: Adams' Equity, 5th Am. ed., marg. p. 272; Russell v. Randolph, 26 Gratt. 717, 718.

In the case at bar, both securities held by the appellant Blakemore did not belong to the common debtor, Davies. The judgment of appellant bound the lands owned by Davies, and also the land owned by Skinner. Davies had no property rights in the land he had sold and conveyed to Skinner. The purchase ²⁷³ money secured by vendor's lien was a mere chose in action, passing to whomsoever the bonds representing the deferred payments might be assigned. Appellant's judgment was not a lien on this chose in action, but it was an express statutory lien upon the land as a result of the failure of Skinner to record his deed before the judgment was docketed.

Patterson and Wise were not injured by Blakemore's releasing his lien on the Skinner land. They had no lien on that land, and were junior lienors on the Davies land. Their situation would be the same, if Blakemore had not made the release, for the primary security of Blakemore was the land still owned by Davies, and Skinner could have compelled him to exhaust that before resorting to his land, which was the ultimate security.

It is contended that the unpaid purchase money due from Skinner to Davies was a "common fund," and primarily liable to the payment of Blakemore's judgment; that when Blakemore released his lien on the Skinner land it was his duty to have had the unpaid purchase money due from Skinner applied to his judgment to the relief of Patterson and Wise, and that his failure to do this is ground in equity for postponing him to the junior judgment in favor of Patterson and Wise.

There is no evidence in the case showing what the amount of this unpaid purchase money was. The deed from Davies to Skinner recites that Skinner on the 1st of October, 1891, executed his bonds for six annual deferred payments of six hundred dollars each, but what became of these bonds, how many of them were unpaid, or who held such, if any, as were unpaid on the 10th of September, 1894, when Blakemore released the lien of his judgment upon the Skinner land, does not appear.

Upon the facts disclosed by the record there was no obligation resting upon Blakemore to take any steps to make his judgment out of any unpaid purchase money due from Skinner to Davies. He had no lien on the purchase money in the hands of Skinner, no suit was pending in which he could ask to have ²⁷⁴ such a fund so applied, no execution had been issued on his judgment, and there was no lien, either legal or equitable, that he could enforce against the bonds representing said purchase money. The law gave Blakemore a lien on his debtor's land, and he had a right to rest upon that lien without pursuing his debtor's personal property. He was under no obligation in respect to the claims of Patterson and Wise. Their judgments were obtained before his lien was released as to the Skinner land. They had equal notice of the recorded deed showing that the vendor's lien was reserved to secure Skinner's purchase money, and their liens being less well secured, they were more interested than Blakemore in having that purchase money applied to the judgments against the common debtor.

Skinner had a right before any suit was brought, or execution issued, to pay his purchase money to Davies, and in this case he ran no risk in doing so, for the land still held by Davies was ample to satisfy the Blakemore judgment.

The court is of opinion that the appellant, Harris C. Blakemore, did not prejudice his rights by releasing the lien of his judgment as to the Skinner land; and is entitled to have said judgment satisfied from the proceeds of sale, as the first lien on the tract of one hundred and twelve acres and twenty-eight poles of land owned by J. Walter Davies, and as the second lien on the tract of two hundred and twenty-two acres, two rods, and twenty-seven poles owned by said Davies—the unpaid purchase money due from Davies' first lien on the last named tract.

For these reasons the decree appealed from must be reversed and annulled, in so far as it is herein declared to be erroneous, and in other respects affirmed, and the cause remanded to the

circuit court for further proceedings therein in accordance with the views expressed in this opinion.

DEBTOR AND CREDITOR—MARSHALING SECURITIES—RELEASING LIENS.—If one creditor can resort to two funds and another to one only, the latter can compel the former to resort to the fund which the latter cannot touch, unless they have not the same creditor, or the two funds are not the property of the same person: *Gotzian v. Shakman*, 89 Wis. 52; 46 Am. St. Rep. 820, and note. But this rule is never applied unless it can be done without injustice to the creditors, or other party in interest, having a title to the double fund, and also without injustice to the common debtor: *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382, and note; and it applies only where there is a common debtor: *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136. As to the right of a creditor having separate securities to release one of them: See *Terry v. Woods*, 6 Smedes & M. 139; 45 Am. Dec. 274; *Scharff v. Meyer*, 133 Mo. 428; 54 Am. St. Rep. 672.

JUDGMENT LIEN—TO WHAT EXTENDS.—The lien of a judgment does not vest in the judgment creditor any estate or interest in the real property subject to it: *Bruce v. Nicholson*, 109 N. C. 202; 26 Am. St. Rep. 562, and note. It is effective only so far as it can be enforced by execution at law: *Lawson v. Jordan*, 19 Ark. 297; 70 Am. Dec. 596; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305, and note; and extends no further than the debtor has power voluntarily to transfer or alienate the lands in satisfaction of his debt: *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236, and note. See monographic note to *Filley v. Duncan*, 93 Am. Dec. 345-358, on the estates and interests affected by a judgment lien.

MOORE LIME COMPANY v. RICHARDSON.

[95 VIRGINIA, 826.]

APPELLATE PROCEDURE—EXCEPTIONS TO INSTRUCTIONS.—A bill of exceptions, which shows that the defendant objected to each and all the instructions given for the plaintiff and to the action of the court in refusing the instructions asked by the defendant and in modifying another instruction, instead of giving it as asked, is sufficient to present the question whether the action of the court was erroneous.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE.—One who is working in the same gang with the plaintiff, but who was at the time acting as foreman in doing the work of moving cars, was his fellow-servant, and not a vice-principal. Hence the plaintiff cannot recover because injured by the negligence of such fellow-servant. The foreman of a gang of laborers, who is himself under the management and control of a superintendent, is a fellow-servant of the persons working under and with him.

MASTER AND SERVANT—FAILURE TO WARN SERVANT OF DANGERS.—A servant who is pushing cars on a railway track in front of him, and who is injured by being struck by other cars pushed by other servants on the same track, cannot recover because the latter did not warn him of the approaching cars, when he was familiar with the work and knew the danger to which he exposed himself when walking behind the cars he thus pushed.

MASTER AND SERVANT—RULES, DUTY OF MASTER TO ADOPT AND PROMULGATE.—One of the positive duties of a mas-

ter is to adopt rules for the protection and safety of his employes, where he is engaged in a complex business requiring definite rules for their protection. The failure to adopt such rules is negligence rendering the master answerable for resulting injuries.

MASTER AND SERVANT—RULES REGULATING WORK, MASTER, WHEN NOT NEGLIGENT IN NOT ADOPTING.—When cars are left on a railroad siding to be loaded, and are required to be moved a short distance down a slight grade to a point where they can be loaded, and this moving is done not by steam, but by a gang of laborers, the work is neither complex nor difficult, and the master is not guilty of negligence because he failed to adopt a set of rules to control such work.

At the trial of the action, the court by instructions numbers 3, 5, and 6, given at the request of the plaintiff, told the jury that if Whitmer acted in the absence of the regular foreman, Rudsill, and had full authority to direct the other laborers at the time of the accident, then Whitmer was the representative of the company, and if the injury to plaintiff's intestate was caused by Whitmer's negligence, the defendant was answerable; that if, in moving the cars, the hands were accustomed to receive warning from the foreman of the approach of a car from behind, and no such warning was given at the time of the accident, the failure to give it was negligence for which the defendant was liable; and that, if the duties of the deceased at the time of the accident required his attention to be directed in front of him, and he was properly discharging his duties and did not know, and had no reason to suppose, a car was approaching him from behind, his failure to look behind was not negligence on his part sufficient to defeat the plaintiff's right of recovery. The court refused instruction number 4 asked by the defendant, and which was to the effect that the deceased assumed all the risks incident to his employment when he entered the service of the defendant, including that of receiving injury from the negligence of fellow-servants, and that if the injury was due to the negligence of the employes who were pushing the car, it cannot be imputed to the defendant. Judgment in favor of the plaintiff, and the defendant sued out a writ of error.

R. L. Parrish and Cabell & Cabell, for the plaintiff in error.

F. G. Woodson and C. M. Lunsford, for the defendant in error.

331 BUCHANAN, J. Whilst working as a day laborer for the defendant company (plaintiff in error here), the plaintiff's intestate received injuries which caused his death. This action

was brought to recover damages therefor, and upon the trial a judgment was rendered against the defendant company.

The first assignment of error is to the action of the court in giving certain instructions for the plaintiff, and the second in refusing to give certain instructions asked for by the defendant, and for modifying another. These assignments of error will be considered together.

The objection made by the plaintiff that the bills of exception upon which these assignments of error are based are insufficient is not well taken. The bills of exception show that the defendant objected to each and all of the instructions given for the plaintiff, and also to the action of the court in refusing to give the rejected instructions, and in modifying another instead of giving it as offered. They are in the usual form where the action of the court upon instructions is excepted to, are sufficient.

³³² The objections made to the plaintiff's instructions, numbered 1, 2, and 7, were abandoned in oral argument.

The plaintiff's instruction, numbered 3, ought not to have been given. Although the jury may have believed all the facts upon which it was based, Whitmer, who was acting as the foreman or leader of the gang of hands of which the plaintiff's intestate was a member when injured, was not the representative of the defendant company, but was a fellow-servant with the deceased.

And for the same reason that the plaintiff's instruction No. 3 should not have been given, the eighth instruction offered by the defendant, and rejected by the court, should have been given.

The evidence tends to prove that the defendant company was engaged in the business of carrying limestone, burning lime, and in shipping both lime and limestone, at and near Eagle Rock, a station on the Chesapeake & Ohio Railway. It had a superintendent of that place who had the general control and management of its business. Rudisill, mentioned in the instruction as foreman, was employed by the company to "trim" or "head up" the barrels in which the lime was shipped, to keep the time of the gang of hands of which the plaintiff's intestate was a member, put them at work each day, and to see that they did the work they were employed to do, which was to wheel wood to the lime kilns, to move cars on the switch to the points where they were to be loaded, and to load them. He also had the power to employ hands to work in that gang, and to discharge them.

Whitmer, one of the gang, receiving the same pay, and doing the same work as its other members, usually directed them when and where the cars were to be moved, and in doing this work it was the duty of the other members of the gang to obey him. On the day of the accident Rudisill was absent, and Whitmer directed the gang to move two cars standing on the switch to the platform where they were to be loaded, a distance of not less than fifty, nor more than one hundred and ³³³ fifty, feet, it would seem. After the gang had started one car down the switch, toward the platform, Whitmer, leaving the plaintiff's intestate pushing the car, directed other members of the gang to go back to the other car, which they did, Whitmer going with them, and, after starting that car, they removed their hands from it and allowed it to move slowly down the switch, which was slightly down grade in the direction of the platform. About the time the car the decedent was pushing reached its destination it was overtaken by the rear car, the bumper of which struck the plaintiff's intestate, driving him against a link in the bumper of the car he was pushing, and inflicting the injuries of which he died. The deceased knew that Whitmer and other members of the gang had gone back for the rear car, but Whitmer did not warn him of its approach, as was frequently, if not usually, done under like circumstances. The deceased had been in the service of the defendant for five or six years, and had been warned not to walk behind the cars when moving them, though it was a common practice to do so. The bumper on each car was about twelve inches long, and ten inches wide. The evidence also tended to show that if the deceased had been pushing the car on either side of the bumper he would not have been injured, as the end of the cars were separated from each other nearly two feet when the bumpers came together.

The ground upon which it is claimed that Whitmer, who was a member of the same gang, doing the same work and receiving the same pay as the plaintiff's intestate, was not a fellow-servant is because he was exercising authority over the gang, or acting as leader or foreman in the work of moving the cars. That this sort of superiority did not make him a vice-principal is clear under the decisions of this court. In the case of *Richmond Locomotive Works v. Ford*, 94 Va. 627, the question was whether the boss or foreman of a gang of hands (of which he was a member), engaged in moving locomotive wheels about the yards of the locomotive works, which was under the management ³³⁴ of a superintendent, was a fellow-servant, or vice-principal. In that

case, it was held that such a boss or foreman was a fellow-servant, and that his negligence was one of the risks which the members of the gang assumed when they entered into the service. It was said in that case that where the execution of work directed to be done by the master or his representative is intrusted to a gang of hands, it is necessary that one of them should be selected as a leader, boss, or foreman, to see to the execution of the work. This kind of superiority of service is so essential and so universal that every workman in entering upon a contract of service must contemplate its being made in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman, or superior servant, stands to him in that respect in the precise position of his other fellow-servants. The manner of performing each of the various duties by which the wheels were to be gotten out and taken where they were needed rested necessarily upon the intelligence, care, and fidelity of the servants to whom that duty was intrusted. If, in the performance of it, the plaintiff was injured by reason of the negligent act of a fellow-servant, although that fellow-servant was the foreman or leader of his gang, it was one of the risks which he assumed.

Instructions numbered 5 and 6 given for the plaintiff were also erroneous. The case of the Richmond Granite Co. v. Bailey, 92 Va. 554, cited by counsel to show that instruction No. 5 was a correct statement of the law does not do so. It is true that a similar instruction was given in that case, but it was expressly stated in the opinion of the court that it was not a correct statement of the law, though, under the peculiar facts of the case, the giving of it was considered harmless error.

Neither does the case of Michael v. Roanoke Machine Works, 90 Va. 492, 44 Am. St. Rep. 927, relied on to show that the court did not err in giving instruction No. 6, do so. That was a case where the ³³⁵ plaintiff had been temporarily ordered to leave his usual place of work, and to work in a place where there were dangers unknown to him, and of which no warning was given. In the case at bar the plaintiff's intestate when injured was engaged in the work which he had been employed to do, and of whose dangers he had full knowledge, since he had been doing the same work for five or six years. Instructions must apply to the facts of the particular case. An instruction which may be entirely correct in one case may be wholly inapplicable to another.

Instruction numbered 4 offered by the defendant company was properly rejected. An employé does not assume all the risks incident to his employment as is stated in the instruction, but only such as are ordinarily incident to the employment: *Bertha Zinc Co. v. Martin*, 93 Va. 791; 3 Elliott on Railroads, sec. 1288.

The action of the court in refusing other instructions of the defendant is assigned as error, but, as the judgment complained of must be reversed for other errors, it is not necessary to pass upon them as they are not likely to arise upon the next trial.

The next question to be considered is, whether the defendant company, as the plaintiff insists, was guilty of negligence in not adopting and publishing safe and proper rules for the regulation of its business.

One of the positive duties of a master is to adopt rules for the protection and safety of his employés, where he is engaged in a complex business which requires definite rules for their protection, and a failure to do so is such negligence as renders him responsible for all injuries resulting therefrom: *Wood on Master and Servant*, sec. 403; *Morgan v. Hudson River etc. Iron Co.*, 133 N. Y. 666.

The evidence tends to show that the defendant had not adopted and published rules regulating the manner in which the cars were to be moved. The cars were left on the railroad siding to be loaded, and had to be moved a short distance, as we ³³⁰ have seen, on a slight down grade to the point where they were to be loaded. They were not moved by steam, but by the strength of the gang of hands. The work was neither complex nor difficult. It is not shown that there was anything in the nature of the work which made it necessary for the defendant to enact rules. Its failure to do so was not proof of negligence, unless it appeared from the nature of the work in which the servants were engaged (and it does not) that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules: *Morgan v. Hudson River etc. Iron Co.*, 133 N. Y. 666.

The third assignment of error is to the action of the court in refusing to permit the defendant company to introduce certain evidence, because it was evidence which ought to have been offered in chief.

As the judgment has to be reversed upon other grounds and a new trial ordered, it is unnecessary to pass upon this question, as it is not likely to arise upon the next trial.

For the foregoing reasons, the judgment complained of must

be reversed, the verdict set aside, and a new trial awarded to be had in accordance with the views expressed in this opinion.

APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY OF.—Error must be apparent in a bill of exceptions: *Johnson v. Lightsey*, 34 Ala. 169; 73 Am. Dec. 450; *Brown v. Gray*, 6 Jones, 103; 72 Am. Dec. 563. Where the bill fails to show that exceptions were taken at the time to rulings of the trial court in giving and refusing instructions, and does not purport to contain all the evidence, the supreme court will not review the decisions of the lower court in giving instructions, or in refusing a new trial: *Love v. Moynahan*, 16 Ill. 277; 63 Am. Dec. 306; *Anderson v. Hill*, 12 Smedes & M. 679; 51 Am. Dec. 130.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS.—One who is engaged with another in the same employment is not divested of the character of a fellow-servant by the mere fact that he has authority to direct the other in his work: *Hayes v. Colchester Mills*, 69 Vt. 1; 60 Am. St. Rep. 915, and note; notes to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 869; *Taylor v. Georgia Marble Co.*, 59 Am. St. Rep. 241. A foreman may be, and ordinarily is, but a mere fellow-servant: *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327, and note.

MASTER AND SERVANT—KNOWLEDGE OF DANGER—MASTER'S DUTY TO WARN.—One who accepts employment with knowledge of the risks does so at his peril, and has no claim for indemnity on the ground of such risks: *Harker v. Burlington etc. Ry. Co.*, 88 Iowa, 409; 45 Am. St. Rep. 242, and note. He will be held to assume such risks as to a person of his experience or understanding are, or ought to be, open and obvious: *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745. And the master need not warn him of such dangers: *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432; *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436.

MASTER AND SERVANT—DUTY OF MASTER TO PRESCRIBE RULES.—A master who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management, and his failure to do so is personal negligence for the consequences of which he is liable to his servant: *Reagan v. St. Louis etc. Ry. Co.*, 93 Mo. 348; 3 Am. St. Rep. 542.

NORFOLK AND WESTERN RAILROAD Co. v. HOUCHINS.

[95 VIRGINIA, 398.]

MASTER AND SERVANT—RISKS OF SERVICE AND GRADES OF EMPLOYMENT.—One who enters the service of another assumes the risks naturally incident to the employment, including the danger of injury by the fault or negligence of another employé in the same employment, and the mere fact that one engaged in the same employment is, by the employer, made a leader, boss, or by whatsoever name he is designated or known, to see to the execution of the work, does not put him in such authority that he is to be deemed a vice-principal.

MASTER AND SERVANT. TEST TO DETERMINE WHO IS VICE-PRINCIPAL.—When a negligent servant is performing some

duty which the master owes to another servant for the latter's safety, and which, therefore, cannot be delegated to another, such negligent servant is a vice-principal.

MASTER AND SERVANT—FELLOW-SERVANTS.—A CONDUCTOR OF A RAILWAY TRAIN and the crew acting under his direction are fellow-servants. Hence the latter cannot recover of the common master for injuries received through the negligence of the conductor in operating or moving his train.

MASTER AND SERVANT.—THE DUTIES WHICH A RAILWAY CORPORATION OWES to a conductor and train crew are to provide reasonably safe and suitable machinery and appliances for the business, including the exercise of reasonable care in furnishing such appliances and the exercise of like care in keeping the same in repair and making proper inspections and tests, to exercise like care in providing and retaining sufficient and suitable servants for the conduct of the business and to establish proper rules and regulations for the service and, having adopted such, to conform to them.

Johnston, Taylor & Johnston and Fulkerson, Page & Hurt, for the plaintiff in error.

W. J. Henson and J. C. Wysor, for the defendant in error.

399 **CARDWELL, J.** This is a writ of error to a judgment in an action of trespass on the case, brought in the circuit court of Giles county by Joseph M. Swaine, administrator of W. G. Houchins, deceased, against the Norfolk & Western Railroad Company, to recover damages for the death of his intestate, alleged to have been occasioned by the negligence of the defendant company.

The facts appearing from the record are not controverted, and are as follows: Houchins was killed about 5:45 A. M. July 15, 1893, while employed as front brakeman on an extra west-bound freight train of the defendant company, known as extra No. 273, in a collision near Shumate, Giles county, between that train and an east-bound train of the defendant company known as the second section of train No. 82, a regular schedule train. The road was single tracked at the locality of the accident, and both trains were running under the general train rules of the defendant company, and not under special order of any kind. Under the general rules of the defendant company, governing these trains, the schedule train known as No. 82, and composed of two sections, numbered 1 and 2, had the right of way, and extra No. 273 should have waited at Shumate until both sections of No. 82 had passed. No. 273, being an extra train, was inferior to both sections of No. 82, a regular schedule train, and the movement of extra No. 273 was accordingly governed by the following rules of the company:

"79. All trains are designated as regular or extra. Regular

trains are those represented on the timetable, and may consist of one or more sections. All sections of a train except the last must display signals as provided in rule No. 36. Extra trains are those not represented on the timetable. An engine without cars, in service on the road, shall be considered a train."

"82. All extra trains are of inferior class to all regular trains of whatever class."

⁴⁰⁰ "83. A train of inferior class must, in all cases, keep out of the way of a train of superior class."

Rule 83 being general and of vital importance, is printed in the rule-book of the company in large type in order to call the particular attention of all employes to it.

On the morning of the accident, extra No. 273 had arrived at Shumate, and was lying on the siding when the first section of No. 82 passed, displaying green signals, to indicate that another train was following. The green signals were displayed as provided in rule No. 36, to wit:

"36. Two green signals by day and two green lights by night, displayed in the places provided for that purpose on the front of an engine, denote that the train is followed by another train running on the same schedule, and entitled to the same timetable rights as the train carrying the signals."

Among other rules of the company governing the entire train crew, under circumstances surrounding the train—extra No. 273, on the occasion of this accident—are these:

"4. Every employé of this company whose duties are in any way prescribed by these rules must always have a copy of them at hand when on duty, and must be conversant with every rule. He must render all the assistance in his power in carrying them out, and immediately report any infringement of them to the head of his department."

"78. All signals must be used strictly in accordance with the rules, and trainmen and enginemen must keep a constant lookout for signals."

The intestate, brakeman Houchins, is shown to have received and receipted for a book of the rules of the defendant company when he entered its service in April, 1890, more than three years before his death.

It is admitted by conductor Miller and engineman Ranson, of extra No. 273, who were examined as witnesses for the plaintiff in this suit, that they saw the green signals displayed on the first section of No. 82, and that they were seen by brakeman Houchins there is no room to doubt; but when the first section ⁴⁰¹

of No. 82 reached and stopped at Shumate, the conductor and all the train crew of extra No. 273, including brakeman Houchins, went to sleep, in utter disregard of their duties, and when conductor Miller awoke he did not know whether the second section of train No. 82 had passed or not. He awoke, he says, just as the first section of No. 82 was leaving, or had left, Shumate. Nor did any of the crew of extra No. 273 know whether the second section of No. 82 had passed or not. Brakeman Houchins was still asleep in the open space between the tracks. Conductor Miller, not knowing whether the second section of No. 82 had passed or not, asked the night telegraph operator at Shumate if second No. 82 had passed, and if it was carrying green signals, and upon being told by the operator that it had passed and was not carrying green signals, conductor Miller, acting upon this incorrect information given him by the operator, aroused his engineman, who in turn awoke brakeman Houchins, and train extra No. 273 was taken out of the siding, and started on its journey west, resulting in a head-on collision between train extra No. 273 and the second section of No. 82, about one mile west of Shumate, causing the death of brakeman Houchins.

It is further shown in the evidence that the conductor of extra No. 273 was not waiting for any signal from the operator at Shumate to take his train out of the siding at that point, nor did he receive, nor was he to receive, any orders or signals from or through the operator for the movement of his train. No change had been made in the semaphore or other fixed signals at Shumate for extra No. 273 to leave that point, because extra No. 273 was running under the general rules. The evidence clearly shows that the accident was caused by the negligent conduct of conductor Miller in ordering his train, extra No. 273, out of the siding at Shumate, in disregard of the general rules of the defendant company governing him and his crew.

That any of the servants of the defendant company were incompetent was neither alleged nor proven; nor was there any allegation ⁴⁰² or proof that the company had failed to furnish safe and suitable machinery, appliances, et cetera, or failed to promulgate proper rules for the government of its servants. In fact, the evidence of both plaintiff and defendant proved conclusively that the rules of the company would have effectually prevented the collision if the conductor and train crew of extra No. 273 had not disobeyed them. But the contention of counsel for defendant in error is, that, as brakeman Houchins was under the control and subject to the orders of conductor Miller;

that the latter stood in the category of principal or vice-principal to brakeman Houchins, and that for the negligence of conductor Miller the company is liable.

The only question which requires any particular consideration by this court is presented in the instructions "XX" and "YY," given by the court, at the trial, *ex mero motu*, over the objection of the plaintiff in error, and which are as follows:

"XX. The court instructs the jury that if they believe from the evidence that the plaintiff's intestate was killed by a collision between two trains of the defendant company, as charged in declaration, and further believe from the evidence that such collision was caused by the carelessness and negligent act of the servants of the defendant company in charge of one of said colliding trains, to wit, train No. 273, and shall further believe from the evidence that all of the employes of the defendant company on said train No. 273, including said intestate, under the rules of said company, were charged with the duty jointly, that is, as a train crew, of properly observing all danger signals, and of providing generally for the safety of the movement of said trains, and that such duty, to care for the safety and movement of the trains, devolved upon all of the employes thereon, and not upon one or more specially, and shall further believe from the evidence that the death of the plaintiff's intestate was caused proximately by the joint negligence of all of said train crew, including said intestate, then the plaintiff cannot recover."

403 "YY. The court instructs the jury that if all the employes of the defendant company on extra No. 273 were jointly and equally charged with the duty of providing for the safe movement of said train, and in this regard were in equal authority, then, as to this duty, and its proper discharge, they were fellow-servants; but if, as to this duty, said employes on said train were not equally charged with the discharge thereof, but one or more of said employes were in authority over the others, then in discharge of such duty, those employes who were in authority over the others were not fellow-servants of those under their authority, so far as the duty devolving on said superior servants was concerned."

These instructions read together, but more particularly the latter, instructed the jury that if conductor Miller was, by the rules of the plaintiff in error, in authority over brakeman Houchins, he, the conductor, was not a fellow-servant of brakeman Houchins. In other words, the instructions told the jury to determine the question of fellow-service between the conductor

and brakeman by the gradations in rank of the two men in the service of the plaintiff in error. They did not require the jury to determine this question by the character of the negligent act causing the injury, but made the determination of the question depend upon whether the negligent servant was in authority over the injured servant.

The opinion by Keith, P., in *Norfolk etc. R. R. Co. v. Nuckol*, 91 Va. 193, reviewed, as far as it was deemed necessary, the former decisions by this court upon the question of fellow-service, and the following propositions of law, pertinent to the case at bar, were laid down: "1. A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow-servant"; and "3. The liability [of the master] does not depend upon gradations in employment, unless the superiority of the person causing ⁴⁰⁴ the injury was such as to put him in the category of principal or vice-principal."

That is to say, that when a person enters the service of another, he assumes the risks naturally incident to the employment, including the danger of injury by the fault or negligence of another engaged in the same employment, and the mere fact that one engaged in the same work or employment is, by the rules of the master for the direction and government of those in his employ, made a leader, boss, or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss, or conductor, one engaged in the same common work of the master is injured, does not of itself place the one so put in authority in the category of principal or vice-principal; but the question remains whether or not the negligent servant was performing some duty which the master owed to the injured servant for his safety, and could not, therefore, delegate to another, which is a mixed question of law and fact, to be determined by the jury under proper instructions. In that case it was held that a track repairer and engineman, though in different departments, were, by the very nature of their employment, brought in frequent contact, and the risk of negligence by the one must therefore be considered to have been in contemplation of the other when service under the common master was accepted.

The decision in that case rested in a large degree upon the reasoning of this court in *Norfolk etc. R. R. Co. v. Donnelley*, 88 Va. 853, in which an injured engineman was denied the right to recover of the railroad company for injuries to him by the neg-

ligent misconstruction of a right of way order by the conductor and engineman on another train, which collided with the train upon which Donnelley was running, and, as was well said by Keith, P., in *Norfolk etc. R. R. Co. v. Nuckol*, 91 Va. 193, the court, by its unanimous opinion, evinced a disposition to return to the simple terms of the rule stated by Chief Justice Shaw in *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49; 38 Am. Dec. 339. It throws aside the doctrine of "inferior and superior" of gradations in employment, and of "separate departments," ⁴⁰⁵ and states forcibly and clearly that "all serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow-servants, and take the risk of each other's negligence."

In *Norfolk etc. R. R. Co. v. Nuckol*, 91 Va. 193, it is clearly shown that the true ground upon which the railroad company was held liable in the case of *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401, was that the company had been negligent in keeping its track in a good and safe condition, and the case one of "concurrence of independent concurring causes."

The cases decided by this court subsequent to its decision in *Norfolk etc. R. R. Co. v. Donnelley*, 88 Va. 853, holding the doctrine that a conductor is not a fellow-servant of a brakeman under him, rested mainly upon *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401, and the case of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, which latter decision has been completely overturned by the more recent decisions of the same court, and which are in thorough accord with the decision of this court in *Donnelley's case* and *Nuckol's case*.

It was therefore properly said by Riely, J., in *Norfolk etc. R. R. Co. v. Ampey*, 93 Va. 108, that the question of the relation of a conductor of a train to the crew under him was an open question, to be decided by this court when it became necessary.

That is the precise question now before us, and from what has gone before, it will be seen that the test is not whether conductor Miller was, by the rules of the plaintiff in error, given authority over his train and of the employes on it, to direct and order them, but whether his negligent act, which resulted in the death of brakeman Houchins, was an act done when in the performance of a duty which the law devolved upon the plaintiff

in error, and so one that is nonassignable, for which the master is still liable, or one of mere operation.

In the case of *Richmond Locomotive Works v. Ford*, 94 Va. 627, the question was, whether a boss or foreman of a gang of hands (of which he was a member), engaged in moving locomotive ⁴⁰⁶ wheels about the yards of the Locomotive Works, which was under the management of a superintendent, was a fellow-servant, or vice-principal. In that case it was held that such a boss or foreman was a fellow-servant, and that the negligence was one of the risks which the members of the gang assumed when they entered into the service. It was said by Buchanan, J., in the opinion: "Where the execution of work directed to be done by the master or his representative is intrusted to a gang of hands, it is necessary that one of them should be selected as leader, boss, or foreman, to see to the execution of the work. This kind of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow-servants": See, also, *Moore Lime Co. v. Richardson*, 95 Va. 326, ante, p. 785.

What was said in that case is applicable to the case at bar. The running of trains by a railroad company is work of such a character as to make it essential that one of the crew on each train be selected as a leader, boss, or conductor as he is always known, to direct the execution of the work, and this kind of superiority, it may be said, is as essential and universal in the moving of trains upon a railroad, as in other pursuits where the employés work in squads, gangs, or crews. Every man, in entering upon a contract of service upon a train, as fireman, engineer, or brakeman, must contemplate its being run under the orders and direction of a conductor, who, though designated as conductor, with authority to control and direct the men under him, is but a colaborer or coworkman with the other members of the crew, engaged in a work of mere operation, a common employment, under one and the same common employer, from whom all derive their authority and compensation. The brakeman, in entering the service of a railroad company, therefore, ⁴⁰⁷ makes his contract of service in contemplation of this superiority of service in the conductor, and assumes the risk of

injury from the negligence of his fellow-workmen, though it be that of a brakeman, fireman, engineman or conductor; and all engaged upon the train, it would seem clear, upon reason and authority, stand to each other in the relation of fellow-servants.

We do not mean to say that, under all circumstances, a conductor of a train is to be held a fellow-servant with the other members of the crew, for he may, under some circumstances, be placed in the category of principal or vice-principal, when he is by authority of the master performing a duty which the master is not permitted by law to delegate to another; but a conductor of a train is not placed in the category of principal or vice-principal by the mere superiority given him in the work of operating or moving his train.

The duties which the master owes to the servant, in a case like the one we have under consideration, may, by abundant authority, be stated as follows: 1. To provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair, and making proper inspections and tests. 2. To exercise like care in providing and retaining sufficient and suitable servants for the conduct of the business. 3. To establish proper rules and regulations for the service, and, having adopted such, to conform to them.

The law is equally as well settled that the master is not required to be a guarantor or insurer in this behalf, but is only required to employ reasonable and ordinary care in selecting what he requires, and is necessary for his business.

In the recent case decided by the supreme court of West Virginia (*Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380), where in it was held that a conductor is a fellow-servant with a brakeman and other servants on the train, not a "vice-principal." Brannon, ⁴⁰⁸ J., in an able opinion, defines what are and what are not the "nonassignable duties" of a railroad company, and says: "The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call 'vice-principal,' because he stands, as to these duties, in the place of the master; but if either fails in the performance of a duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant,

it is the act purely of the servant, and the injured servant must look to him, not to the master. These duties falling upon the master are called 'nonassignable duties,' because he owes them to the servant, and he cannot assign them to another to perform, and exempt himself from liability for their misperformance. These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servants must perform well in the interest of their master and fellow-servants; and if one fails to do so, and injures a fellow-servant, the master is not liable, since he cannot always stand by and watch the servant in his every act, in the carrying on or operation of the business, and the law, of necessity, permits him to commit this work of mere operation to other hands.

Learned commentators have said: "The law is severe enough in holding employers responsible for good track, machinery, et cetera, without making them guarantors for the acts of every ¹⁰⁹ servant. You cannot make the master liable for an act of mere operation, no matter by what servant done. You cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant. If he does the act in person, he is liable regardless of the act": Wharton on Negligence, sec. 205; Beach on Contributory Negligence, secs. 302, 303.

The rule known as the rule of "superior servant," that is, where the negligent servant is in grade of employment superior to the injured one, or where one servant is placed by the master in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his alter ego, or vice-principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable, originated, it may be said, in the case of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, and nearly all the decisions of the other courts holding to the doctrine that a conductor of a train was a vice-principal, standing in the

shoes of his master, because given authority and control over his train, and of the other employés on it, et cetera, are traceable to the Ross case as the authority upon which the decision mainly rested. But the doctrine enunciated in the Ross case has, as we have before said, been overthrown by the more recent decisions of the United States supreme court, among which are: *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368; *North Pacific R. R. Co. v. Hamblly*, 154 U. S. 349; *Central R. R. Co. v. Keegan*, 160 U. S. 259; *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346; *Northern Pac. R. R. Co. v. Charles*, 162 U. S. 359; *Oakes v. Mase*, 165 U. S. 363; *Martin v. Atchison etc. R. R. Co.*, 166 U. S. 399. In the last case only Justice Harlan dissented. See, also, *Alaska Min. Co. v. Whelan*, 168 U. S. 86, recently decided by the United States supreme court.

In the case of *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, the court carefully reviews the subject, and holds that a foreman of a gang of ⁴¹⁰ laborers, having in charge the superintendence of the gang in working, with power to hire and discharge hands, and exclusive charge of their direction and management in their employment, is a fellow-servant, in fact and in law, with others of the gang, and that the company is not liable for any injury received by one of them from the negligence of the foreman, because of their fellow service. The syllabus in that case is: 1. That the mere superiority of the negligent employé in position and in power to give orders to subordinates is not a ground for such liability; 2. That in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department; 3. That when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, and given control therein, may be considered, with reference to employes under them, vice-principals and representatives of the master, as fully as if the entire business of the master were placed by him under one superintendent.

Elliott, in his recent work on Railroads, volume 3, section 1330, says: "There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow-servants, the very decided weight of au-

thority holding them to be fellow-servants. This seems to us the only rule that can be defended on principle; for such employés are, in the strictest sense, engaged in the service of a common master, their service is of the same general character, and the object of the service is a common one. . . . We cannot perceive how the doctrine which declares that employés of the same train are not fellow-servants can be upheld without violating the principle that the details of operating a railroad do not pertain to, or form a part of, the master's duty.

⁴¹¹ And in section 1331 the same author says: "It seems to us that the rule must be the same whether the trainmen are engaged on the same train, or on different trains. There is, as we think, no valid reason for discriminating between cases where the employés are engaged in operating the same train, and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service, and by a common master."

In the view taken by this learned author we fully concur, and, in addition to the numerous authorities cited by him in favor of the doctrine that trainmen, although engaged on different trains, are fellow-servants, many others may be cited, among which are: 3 Wood's Railway Law, 1788; Wood's Master and Servant, sec. 448; Story's Agency, sec. 453; Webb's Political Torts, 121; 7 Am. & Eng. Ency. of Law, 834, and notes; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181; *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327; *Mobile Ry. Co. v. Smith*, 59 Ala. 245; *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 517; 39 Am. St. Rep. 750; *Mechem on Agency*, sec. 668; *Avery v. Meek*, 96 Ky. 192; *Norfolk etc. R. R. Co. v. Donnelley*, 88 Va. 853; *Norfolk etc. Ry. Co. v. Nuckol*, 91 Va. 193,

Judge Cooley, in his work on Torts, second edition, pages 639, 640, says: "In some quarters a strong disposition has been manifested to hold the rule [of fellow service] not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and

it seems impossible, therefore, to hold that the servant contracts to run the risk of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could the distinction be admitted, whether we consider ⁴¹² the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be submitted to risks. Sound policy seems to require that the law should make it for the interest of the servant that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful; and, in this regard it can make little difference what is the grade of the negligent servant, except as the superior authority may render the negligence more dangerous, et cetera:" See, also, authorities cited in Cooley on Torts, 640, note 1.

In England, and in some of the states of the Union, this question of fellow service is controlled by statute, but we have no such statute in our state, and the doctrine enunciated in *Norfolk etc. R. R. Co. v. Donnelley*, 88 Va. 853, and *Norfolk etc. R. R. Co. v. Nuckol*, 91 Va. 193, sustained by the most eminent commentators, and a great majority of the adjudicated cases, whose reasoning is followed in the decision of this case, must be regarded as the settled law with us until the law-making power of the state may deem it proper to change it.

It follows that we are of opinion that instructions "XX" and "YY," given by the court below, are erroneous, and should not have been given, nor should the instruction numbered 1, given at the instance of the plaintiff, which we have not deemed it necessary to set out at length in this opinion, but which is in conflict herewith.

The judgment of the circuit court must, therefore, be reversed and annulled, and the cause remanded for a new trial, to be had in accordance with this opinion.

MASTER AND SERVANT—ASSUMPTION OF RISKS—NEGLIGENCE OF FELLOW-SERVANT.—A servant upon entering an employment assumes the natural and ordinary risks incident to the business in which he engages and impliedly contracts that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant in the employment of whom the master has exercised proper care: *Western Stone Co. v. Whalen*, 151 Ill. 472; 42 Am. St. Rep. 244, and note; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep. 621; *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870. Mere authority of one of two persons

in a common employment to direct the other in his work does not divest him of his character as fellow-servant: *Note to Moore Lime Co. v. Richardson*, 95 Va. 326; ante, p. 785.

MASTER AND SERVANT—VICE-PRINCIPAL—WHO IS.—If a master owes a duty to his servants, and deposes the performance of that duty to another servant, then the latter is the representative of the master for whose negligence, resulting in the injury of another servant, the master is liable: *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290, and note. The duty of providing for the safety of employes rests on the employer and cannot be delegated: *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443, and note; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note; *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436; 52 Am. St. Rep. 896.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE.—RAILROAD EMPLOYEES.—A conductor and brakeman on the same train are fellow-servants: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878. Contra, *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814, and note citing cases. A conductor having the entire control and management of a train is a vice-principal: *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870; *Railroad v. Spence*, 93 Tenn. 173; 42 Am. St. Rep. 907, and note; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673.

RAILROAD COMPANIES—DUTIES TO EMPLOYEES.—The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of the employes as will reasonably protect them against the dangers incident to their employment: *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844; *Lewis v. Selfert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Missouri etc. Ry. Co. v. McElyea*, 71 Tex. 386; 10 Am. St. Rep. 749.

COONS v. COONS.

[95 VIRGINIA, 434.]

ARBITRATION—UMPIRE, DUTIES OF.—An umpire, or third arbitrator, must pursue the same regular course with respect to the conduct of the cause as if he were to commence a new cause as arbitrator. He may not take the evidence, or any part of it, from the notes of the other arbitrators, but must examine such witnesses as the parties choose to produce and as to such points as they may choose to raise, although the same witnesses have already been examined upon the same points before the other arbitrators.

ARBITRATION—UMPIRE, NOTICE AND HEARING BEFORE.—If two arbitrators are unable to agree, and, acting upon a power given them, they select an umpire, or third arbitrator, the parties are entitled to notice of such election and an opportunity to be heard before him, and an award against a party who was neither heard, nor given an opportunity for a hearing, before such umpire, he acting upon a statement of the testimony made by the other arbi-

trators, is invalid, where there has been no waiver of the right to a hearing.

ARBITRATION—WAIVER OF RIGHT TO BE HEARD BEFORE AN UMPIRE.—Though a party may waive his right to be heard and to offer evidence before an umpire, his waiver must be established by clear and conclusive evidence.

ARBITRATION—ESTOPPEL TO RESIST AN AWARD.—The fact that a person against whom an award was made had at first intended to abide by it, and, with that object in view, had the necessary papers prepared, does not estop him from resisting the award on discovering that it was made by an umpire who did not hear any of the evidence, but acted on statements thereof made by the other arbitrators, and did not give the parties any notice of his appointment nor any opportunity to present their cause to him.

EQUITY—JURISDICTION OF, INCIDENT TO SETTING ASIDE AN AWARD.—If a suit in equity is brought to set aside an award, and the defendant, by cross-bill asks that he be awarded relief in case the award is found invalid, the court obtains jurisdiction to decide the whole controversy, though the issues are legal in their nature and capable of trial in a court of law, and hence may proceed to determine the differences between the parties and settle the questions between them which were submitted to the arbitrators.

G. D. Gray, J. L. Jeffries, and L. L. Lewis, for the appellant.

Rixey & Barbour and J. C. Gibson, for the appellee.

435 KEITH, P. J. W. Coons and H. C. Coons having a controversy as to their respective rights in certain property, real and personal, and H. C. Coons claiming that upon certain accounts between them a balance would be found due to him, the parties agreed by writing under seal to submit their differences to "Alwyn Jameson and C. J. Rixey to arbitrate matters in controversy between us as stated below, with power to mutually agree on a third arbitrator to decide any difference that they may not be able to agree upon. The matters in controversy to be decided are all accounts and property, in which we are jointly interested. We agree and bind ourselves to abide by the decision of the said arbitrators."

"Witness our hands and seals this 27th day of May, 1892.

"J. W. COONS [Seal]

"H. C. COONS [Seal]"

The parties appeared before the board of arbitrators in person, and each introduced witnesses, and, the arbitrators failing to agree, they, in accordance with the terms of submission, selected G. B. W. Nalle, who made an award in which Jameson united, by which it was ascertained that J. W. Coons should pay to H. C. Coons four thousand four hundred and eighty-two dollars and seventy cents, one-third in cash, and the balance in two years, with six per cent interest, to be secured to the satis-

faction of H. C. Coons, to be in full settlement of all claims on the part of H. C. Coons against J. W. Coons. When the award was first promulgated, J. W. Coons, while expressing great dissatisfaction with it, appears to have intended to abide by and execute it, and with that end in view, had the necessary papers prepared, which, when submitted to H. C. Coons, did not meet the approbation of himself, or of his counsel. The delay consequent upon his objection resulted finally in an investigation on the part of J. W. Coons as to the mode of procedure upon ⁴³⁶ the part of the arbitrators, and, as a result of that investigation, he determined to resist the award. Some time thereafter H. C. Coons instituted an action of covenant upon the award, and thereupon J. W. Coons filed his bill in the circuit court of Culpeper county, in which he makes H. C. Coons a defendant, and attacks the award of the arbitrators: 1. Because it fails to pass upon certain matters included in the submission; 2. Because it does pass upon matters not included in submission; 3. Because upon its face the award is erroneous, in violating the provisions of the statute of limitations; 4. Because of misconduct upon the part of one of the arbitrators; and 5. Because the umpire or third arbitrator, "without giving any notice to your orator, and without his knowledge or consent, and without hearing any evidence, made up his award solely and exclusively upon the statements of the two arbitrators made in the absence and without the knowledge of your orator, and thus your orator's cause was adjudged and decided without a hearing, contrary to all law, human and divine."

The bill prays that H. C. Coons may be enjoined from the further prosecution of the action at law brought by him, and an injunction was awarded.

The answer of the defendant denies all the equities set up in the bill, gives a statement of the transactions out of which the original controversy grew, and concludes with the prayer that it may be treated as a cross-bill, and relief afforded him in the event the court should be of opinion that the award was for any cause invalid. The answer treated as a cross-bill was itself answered by the plaintiff, J. W. Coons, and upon the issues thus made much testimony was taken, and, the cause coming on finally to be heard before the circuit court, the bill of the plaintiff was dismissed; and thereupon he applied for and obtained an appeal from one of the judges of this court.

⁴³⁷ In the view we have taken of this case it will be only necessary to consider the effect upon the award of the failure

of the arbitrators to give notice of the appointment of the third arbitrator, and to have the case reheard if either of the parties desired to do so.

The evidence upon this point is, that upon the disagreement of Jameson and Rixey, they in the first place selected B. W. Stringfellow, who was objected to by J. W. Coons on account of some supposed connection between him and the wife of H. C. Coons; thereupon the arbitrators agreed upon G. B. W. Nalle, who consented to serve. J. W. Coons denies that he was ever notified of Nalle's appointment, and there is no proof of the fact. It does appear that about 1 o'clock on the day that the award was made, J. W. Coons was in the town of Culpeper, and that he was then informed that the arbitrators were in session, and about 4 o'clock of the same day their award was announced.

Taking the facts proved, and deducing from them all the inferences with which J. W. Coons could, with propriety, be affected, the case stands thus: He knew that he had submitted this controversy to the arbitrament of Jameson and Rixey. He knew that they had been unable to agree, and that, in pursuance of the authority vested in them by the terms of the submission, they had appointed a third arbitrator to whom he had objected, and on learning that the board was in session on the day that the award was made, he may be presumed to have known that choice of a third arbitrator had been made. But assuming all this to be so, and nothing more than this can be imputed to him, was he not then justified in assuming that the board would proceed in accordance with the law, and notify him of their readiness to hear any testimony he might desire to adduce? This brings us to the consideration of the question as to what is the duty of arbitrators under such circumstances, for that he had a right to assume that they would perform their duty in accordance with the law in a regular and orderly manner cannot be denied.

438 Boards of arbitration, which are courts of the parties' own selection, are favored by the law, and every fair presumption is made in order to sustain their award. This, we believe, is the universal rule applied to the interpretation of the agreement to submit, and to all the proceedings which lead up to, and result in, the award.

In *Pollock v. Sutherland*, 25 Gratt. 78, Judge Moncure says: "All fair presumptions shall be made in favor of an award; and if, on any fair presumption, the award may be brought within the submission, it shall be sustained."

But there are certain immutable principles with reference to the administration of justice which cannot be disregarded in any tribunal which undertakes to pass upon the rights of others. "It is a cardinal principle in the administration of justice that no man can be condemned, or divested of his rights, until he has had the opportunity of being heard, and, if judgment is rendered against him before that is done, the proceedings will be as utterly void as if the court had undertaken to act where the subject matter was not within its cognizance": *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299.

Jurisdiction of the cause and parties is essential to the conclusiveness of a judgment or decree. To acquire jurisdiction of the defendant, it is necessary that in some appropriate way he be notified of the pendency of the suit. If, upon the inspection of the record, it appears that no such notice has been given, the judgment or decree is void": *Wilcher v. Robertson*, 78 Va. 616.

"Notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts, and judgment without jurisdiction is a nullity": *Dorr v. Rohr*, 82 Va. 363; 3 Am. St. Rep. 106; *Staunton Perpetual etc. Co. v. Haden*, 92 Va. 201, and authorities cited.

And while there seem to be adjudged cases in which this rule has been somewhat relaxed as to arbitrations, they do not meet with our approval. The injustice is the same, and the injury as great, to deprive one of a right without a hearing before arbitrators as before a court.

⁴³⁹ In *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522, it is held that "parties are always entitled to a hearing before arbitrators, unless that hearing is waived; and that if an umpire or other arbitrator is called in, in case of disagreement, the same rule as to a right of rehearing applies. The waiver of this right must be distinct and unequivocal." And in *Elmen-dorf v. Harris*, 23 Wend. 628, 35 Am. Dec. 587: "If an umpire decides without having appointed a time for hearing, and without giving notice of it to a losing party, the award is a nullity in a court of law."

The case of *Hall v. Lawrence*, 4 Term. Rep. 589, has led to much controversy. It seems to hold that the parties need not be notified, or be given an opportunity for the introduction of evidence, or have their case reheard before a third arbitrator. It is generally considered that the case turned upon the doctrine of waiver, and upon that suggestion only can it

be supported. In *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522, it is said: "*Hall v. Lawrence*, 4 Term. Rep. 589, has sometimes been misunderstood as deciding a general rule in the law of arbitrations. Its effect should be limited to the proposition that parties may waive their clear and indisputable right to a rehearing of the cause. To that extent it is sound law."

In *Salkeld v. Slater*, 12 Ad. & E. 767, Chief Justice Denman says: "It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses. The objection to a different course may be waived, but more complete proof of waiver should be given than in the present case": See, also, *Goldsmith v. Tilly*, 1 Har. & J. 361; *Thomas v. West Jersey R. R. Co.*, 24 N. J. Eq. 567; *Shivey v. Knoblock*, 8 Ind. App. 433; *Lutz v. Linthicum*, 8 Pet. 165.

Russell on the Power and Duty of Arbitrators, page 228, says: "The umpire [and the duty of an umpire is universally regarded as identical with that of the third arbitrator], when called upon to act, is in general invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the ⁴⁴⁰ same duties. He must pursue the same regular course with respect to the conduct of the case, as if he were commencing a new case as arbitrator. He must examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined to the same points before the arbitrators. He may not take the evidence, or any part of it from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course."

We deduce from the authorities the general rule that where two arbitrators who differ have the power to appoint a third, who shall have authority to decide between them, it is necessary to inform the parties in interest of his appointment, and give them a reasonable opportunity to produce evidence before them touching the matters in controversy.

J. W. Coons was never informed of the appointment of the third arbitrator. As far as the record shows, it came to his knowledge casually, while in the town of Culpeper. He seems to have known that the board was in session, but as he only arrived in the town at 1 o'clock P. M., and the award was announced at 4 o'clock on the evening of that day, we think the facts are insufficient to charge him with having waived his right to appear, or having acquiesced in the denial of an oppor-

tunity to introduce witnesses in his behalf. It is unnecessary to cite authorities upon this point. The cases already alluded to as to the duty of the arbitrators to rehear afford abundant support for the proposition that, while the right under consideration may be waived, evidence of the waiver must be clear and conclusive.

It is contended on behalf of the appellees that there has been a ratification of the award by which any errors or imperfections in the proceedings which led up to it have been cured.

In the statement of facts at the beginning of this opinion, we have summarized the evidence upon this point. Only a short time elapsed between the rendition of the award and the determination ⁴⁴¹ upon the part of J. W. Coons to attack it by bill in equity. He was disposed, in the first place, to abide by it, and papers were prepared and steps taken looking to its execution, but nothing was consummated, and nothing was done which in any degree compromised or affected the right of H. C. Coons. There is nothing in the situation which invites a court to apply the doctrine of estoppel to the conduct of J. W. Coons, and what was done falls far short of an express ratification.

We are of the opinion that, for the failure upon the part of the arbitrators to notify the appellant of the appointment of the third arbitrator, and of their readiness to proceed with the case, thus affording him the opportunity to introduce evidence in support of his contention, the award should be vacated and annulled.

Having reached this conclusion, it is unnecessary to discuss the other grounds of attack stated in the bill.

We will now consider the prayer of the cross-bill for relief. Every party in interest is before the court upon a bill to set aside an award upon grounds which unquestionably give a court of equity jurisdiction. This jurisdiction having once attached for the purpose of injunction, the court may decide the whole controversy, and render a final decree, though all the issues are legal in their nature, capable of being tried by a court of law, and the legal remedies therefor adequate: *Jesus College v. Bloom*, 3 Atk. 262; *Armstrong v. Gilchrist*, 2 Johns. Cas. 431; *People v. Chicago*, 53 Ill. 424; *Miller v. Wills*, 95 Va. 337; where the question was conclusively discussed by Judge Riely; 1 *Pomeroy's Equity Jurisprudence*, sec. 236.

We are therefore of opinion that the decree of the circuit court of Culpeper county should be reversed, and the cause re-

manded, with instruction to refer it to a commissioner in chancery to ascertain in what property, real and personal, J. W. and H. C. Coons were jointly interested on the twenty-seventh day of May, 1892, and to state and settle all joint accounts existing between ⁴⁴² them at that date, the commissioner to consider so much of the evidence set out in this record as may be pertinent to the inquiry directed, and any other evidence that the parties may desire to present.

ARBITRATION AND AWARD—DETERMINATION BY UMPIRE.—Where, by the terms of submission, the two arbitrators, if they were unable to agree, were to call in a third, the decision of any two of them to be final, an award rendered by the umpire and one of the arbitrators without a rehearing of the parties was held invalid: *Day v. Hammond*, 57 N. Y. 479; 15 Am. Rep. 522. See *Haven v. Winnisummet Co.*, 11 Allen, 377; 87 Am. Dec. 723. An award is void at law if the umpire or arbitrators proceed ex parte without notice to the parties: *Elmendorf v. Harris*, 23 Wend. 628; 35 Am. Dec. 587, and extended note; note to *Brush v. Fisher*, 14 Am. St. Rep. 518.

ARBITRATION AND AWARD—WAIVER OF NOTICE TO BE HEARD.—Notice of the time and place of hearing may be waived by a party to an award, and notice to the umpire that he will not attend is a waiver of such notice: *Graham v. Graham*, 9 Pa. St. 254; 49 Am. Dec. 557, and note.

PETTICOLAS v. RICHMOND.

[95 VIRGINIA, 456.]

A JUDGMENT AGAINST ONE OF SEVERAL COTRESPASSERS bars any future action against the others, though wholly unsatisfied.

Pollard & Sands, for the plaintiff in error.

C. V. Meredith, for the defendant in error.

⁴⁵⁸ **BUCHANAN, J.** The only question to be decided on this writ of error is whether the plea filed by the defendant that the plaintiff had theretofore recovered a judgment against a cotrespasser for the same trespass or cause of action was sufficient, without averring that the judgment had been satisfied.

It is impossible to hold that such an averment was necessary without overruling the case of *Wilkes v. Jackson*, 2 Hen. & M. 355, and disregarding the common-law doctrine upon the subject as understood in England as well as in this state.

It is insisted that the decision in *Wilkes v. Jackson*, 2 Hen. & M. 355, is in conflict with the great weight of American authority and wrong in principle, and that it was decided with-

out much consideration. It is true that most of the decisions of the courts of this country which have passed upon the question, including the supreme court of the United States, are in conflict with that decision. ⁴⁵⁹ There is no foundation, however, in our judgment, for the suggestion that the case was not much considered, and that the case of *Ammonett v. Harris*, 1 Hen. & M. 488, to which it refers as settling the principle governing both cases, does not sustain it.

These cases were decided by the same judges, with one exception in each case, and within six months of each other. Both cases were argued by very able counsel. In the earlier case most, if not all, the English authorities were cited and commented on. In each case all of the judges delivered opinions, which, when the two cases are considered together, show that the question of the right of a plaintiff to recover more than one judgment for a joint trespass, whether his action be joint or several, was examined with much care and learning, and the conclusion reached that only one final judgment could be rendered in a joint action, although there were several verdicts, and that a judgment against one trespasser may be pleaded in bar to an action brought against another for the same trespass, although there was no averment in the plea that the judgment had been satisfied.

If the conclusions reached in those cases were erroneous, it was not because the judges (distinguished alike for ability and fidelity) did not give the questions involved proper consideration, but because they fell into the same error, if it be error, that Baron Comyns, Baron Park, and other great English common-law judges and lawyers fell into when they declared that such was the common-law rule, and which the courts and judges of England are still laboring under, for we find that the court of exchequer in 1872, in the case of *Brinsmead v. Harrison*, L. R. 7 Com. P. 552, decided the precise question involved in *Wilkes v. Jackson*, 2 Hen. & M. 355, the same way. In that case, Kelly, C. B., after citing *Brown v. Wooton*, Yelv. 67 (cited and relied on in *Ammonett v. Harris*, 1 Hen. & M. 488, and *Wilkes v. Jackson*, 2 Hen. & M. 355), said: "This appears to me to be satisfactory and binding authority, and the more so because I find that one hundred and fifty years afterward ⁴⁶⁰ it is quoted in a book of the highest authority, viz., Comyns' Digest, which alone would make it a satisfactory guide for us on the present occasion. But it does not stop there, for I find that *Brown v. Wooton*, Yelv. 67, and all

the older cases are referred to in *King v. Hoare*, 13 Mees. & W. 494, where the question was fully and elaborately considered in the court of exchequer, and a judgment pronounced by one of the most learned judges that ever sat in Westminster Hall. It is unnecessary to go through the enlightened reasoning of that very learned person. Suffice it to say that he deals with the whole law upon the subject. . . . There being, then, this series of authorities, satisfactory of themselves, and having the sanction and approval of Chief Baron Comyns and Lord Wensleydale, notwithstanding the respect we entertain for the opinions and decisions of the American courts, where a different view of the law seems to be entertained, I think we are bound to follow those of our own courts, and to hold that, upon principle as well as upon authority, this plea is a good answer to the action; and consequently the defendant is entitled to judgment."

We have neither the right nor the inclination to overrule the decision in the case of *Wilkes v. Jackson*, 2 Hen. & M. 355, It was decided nearly a century ago. It is in accord with the common-law doctrine upon the subject as understood and administered in the English courts before and since that decision was made. It has been referred to with approval in our own courts (*Wells v. Jackson*, 3 Munf. 459, and *Brown v. Johnson*, 13 Gratt. 651) and seems to have met with the approval of the bar and the legislature, as no effort, so far as we know, has ever been made to change the law as laid down in that case, although the legislature has made changes in a like rule of the common law that a judgment recovered against one joint obligor was a bar to an action against another, on the same contract.

There is no error in the judgment complained of, and it must be affirmed.

JUDGMENT AGAINST ONE COTRESPASSER AS BAR TO ACTION AGAINST OTHERS.—The law, as settled in England, is that a judgment in an action against one of two joint wrong-doers, of itself, without satisfaction or execution, is a sufficient bar to an action against the other for the same cause; but the opposite view has been generally adopted in this country: See extended note to *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 907. A judgment against one of several wrongdoers unsatisfied is not a bar to the maintenance of an action against the others: *Russell v. McCall*, 141 N. Y. 437; 38 Am. St. Rep. 807, and note; though execution has issued upon it: *Cleveland v. Bangor*, 87 Me. 259; 47 Am. St. Rep. 326. But the plaintiff can have but one satisfaction: *Vandiver v. Pollak*, 107 Ala. 547; 54 Am. St. Rep. 118; *Valparaiso v. Moffitt*, 12 Ind. App. 250; 54 Am. St. Rep. 522, and note.

GREER v. HALE.

[95 VIRGINIA, 533.]

JUDGMENT—RELIEF FROM IN EQUITY BECAUSE OF USURY.—A court of equity will relieve against a judgment obtained by default upon a contract tainted with usury.

USURY—RELIEF FROM.—Where usury is established, the measure of relief, whether the question is presented at law or in equity, is that the lender may recover only the principal sum.

E. W. Sanderson, for the appellant.

Dillard & Lee, for the appellees.

534 HARRISON, J. The questions raised in this case for consideration are: 1. Will a court of equity relieve against a judgment obtained at law, by default, upon a contract tainted with usury? 2. If it will, what is the measure of relief?

If the question were one of first impression in this state there would be great force in the view urged by the counsel for appellant that a defendant who has had ample opportunity to make his defense in an action at law without availing himself of it, should not, in a subsequent chancery proceeding brought to enforce the judgment at law, be permitted to disturb its finality by interposing the defense that the contract upon which it was founded was tainted with usury.

It is, however, well settled in Virginia that a court of equity will interfere with a judgment at law to relieve against usury. This was held in *Young v. Scott*, 4 Rand. 415, and the doctrine has since been recognized in a number of cases, the latest being *Exchange etc. Bank v. Fugate*, 93 Va. 821. It would serve no good purpose to advert to the reasons which led to the exercise of this jurisdiction, for whether those reasons commended themselves to our judgment or not it would be our duty to enforce the law as established.

The change in the statute declaring that usurious contracts shall be deemed to be for an illegal consideration instead of void, as formerly, furnishes no warrant for departing from the long-established doctrine that a court of equity will go behind a judgment to relieve against usury. Nor do the recent decisions of *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, and *Munford v. McVeigh*, 92 Va. 446, construing that change in the statute, furnish any ground for that contention.

In the case of *Munford v. McVeigh*, 92 Va. 446, the statute law of this commonwealth, and the decisions of this court upon

the ⁵³⁵ subject of usury were elaborately reviewed, and the conclusion reached that the change in the law which declares that usurious contracts "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or foreborne" has made it possible to bring the relief afforded in courts of law and equity, if usury be established, the lender can only recover the principal sum loaned or forborne.

It may now be regarded as settled that in all cases involving the charge of usury, whether at law or in equity, no matter in what manner the question may be presented to the court, if the usury be established, the measure of relief will be that the lender can only recover the principal sum loaned or forborne, subject, of course, to the rule laid down in *Munford v. McVeigh*, 92 Va. 446, touching the application of payments.

There is no error in the decree appealed from, and it is affirmed.

JUDGMENTS—EQUITABLE RELIEF FROM.—Though a part of the sum for which judgment was rendered was justly due, a court of equity will grant relief, if such judgment was procured through fraud and conspiracy, and was for a much larger sum than was due: *Lang Syne etc. Min. Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337. The subject of equitable relief from judgments is treated in the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-261.

USURY—PAYMENT OF—MEASURE OF RECOVERY.—It is generally held that the reservation of illegal interest does not prevent the recovery of the principal and legal interest thereon: *Philadelphia etc. R. R. Co. v. Lewis*, 33 Pa. St. 33; 75 Am. Dec. 574, and note; *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; 32 Am. Dec. 707. Though it has been held that where usurious interest is paid on a note after its execution, it amounts to a payment of so much of the principal: *Musselman v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445. Where usurious interest has been paid, the measure of recovery back is the excess paid over the amount of legal interest: *Note to Bexar Bldg. etc. Assn. v. Robinson*, 22 Am. St. Rep. 41; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694; *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78.

DULANEY v. WILLIS.

[95 VIRGINIA, 606.]

AN EQUITABLE MORTGAGE ARISES whenever a writing shows a clear agreement to make some particular property security for the debt or obligation mentioned therein.

TRUST DEED, IMPERFECT, IS AN EQUITABLE MORTGAGE.—A TRUST DEED purporting to be executed for the purpose of securing a specified sum, but omitting the name of the trustees, is enforceable as an equitable mortgage.

CONVEYANCE—REGISTRATION OF, AGAINST WHOM NOT NECESSARY.—The rights of the general creditors of a decedent are subject to all the equities enforceable against him, and therefore they cannot resist an equitable mortgage of his realty on the ground that it is not acknowledged or recorded.

R. C. Scott and Scott & Staples, for the appellant.

Leake & Carter, Christian & Christian, B. Rand Wellford, Charles S. Stringfellow, W. B. Tennant, and Ed. Nichols, for the appellees.

⁶⁰⁷ HARRISON, J. On the fourth day of July, 1893, James Alfred Jones, of the first part, signed, sealed, and delivered to R. H. Dulaney, of the third part, a deed conveying to ———, as trustee of the second part, certain lands therein described in trust to secure said Dulaney against loss from indorsements theretofore made, and thereafter to be made by him on certain notes of the said Jones.

The grantor died in February, 1894, insolvent, and Dulaney has had to pay a large sum as indorser of the notes mentioned in the deed.

The general creditors of deceased contest the right of appellant to a specific lien upon the lands conveyed, and insist that he is only entitled to share ratably with them in the proceeds. Two grounds are urged in support of this contention.

First, that the instrument in question is not a deed, and is absolutely void in law; that it is lacking in one essential particular to make it a deed, there being no party of the second part mentioned therein as grantee, and consequently no one in whom the legal title could vest.

That the writing in question is valid as a contract between James Alfred Jones and R. H. Dulaney whereby the former agreed that the latter should have a lien, for his protection as indorser, upon the lands mentioned therein, and that such an agreement will be enforced, and effect given to the intention of the parties, is well settled by abundant authority. The lien created by such a contract is defined to be an "equitable mortgage," and it arises whenever the agreement shows a clear intention ⁶⁰⁸ to make some particular property a security for the debt or obligation mentioned therein.

Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, and enforced upon the principle that equity will treat that as done which, by agreement, is to be done: 1 Jones on Mortgages, secs. 162, 163, 168; Beach on Modern Equity Jurisprudence, secs.

291, 292; *McQuie v. Peay*, 58 Mo. 56; *Ruffners v. Putney*, 12 Gratt. 551.

The paper in question is in the handwriting of the deceased. Its object and purpose is expressed in the following language: "Now, therefore, the said James Alfred Jones, desiring to secure the said R. H. Dulaney from loss by such indorsement of said notes, or renewal of notes, or any of them, that he may consent to indorse, doth bargain, sell, and convey unto the said party of the second part, as trustee, in trust to secure said notes" the property described therein.

Treating the paper as a contract between the parties, its terms are clear and unambiguous, it is about a lawful subject matter, founded upon a valuable consideration, and, under the established doctrine adverted to, effect should be given to the manifest intention therein expressed.

The second contention is, that the writing not being acknowledged and recorded, no rights can be claimed under it superior to those of the general creditors.

It is the established doctrine in this state that the rights of the general creditors of a decedent's estate are subject to all the equities attaching thereto at the time of his death; that they take the estate in the same plight and condition in which the debtor left it, and their rights cannot be enlarged and improved beyond those of the debtor, to the prejudice of a creditor who has taken a lien, though he may have failed to record it. The creditor who seeks to assail it must come with a lien by judgment or otherwise giving him a right to charge the property specifically: *McCandlish v. Keen*, 13 Gratt. 615.

There has been no change in the registry laws since the decision ⁶⁰⁹ of the case cited that affects the conclusion therein reached, nor is there any distinction in principle between the right of a general creditor to assail a valid lien that is capable of being recorded but is not; and his right to attack such a lien that is not capable of being recorded. The creditor with a valid lien, whether capable of being recorded or not, may, in the lifetime of his debtor, file his bill in equity to enforce it against the specific property pledged as security, and the general creditor cannot resist or assail it without first reducing his claim to judgment or some other form of lien, and he stands on no higher footing after the death of his debtor than he did before.

The lien claimed by appellant could have been enforced in the lifetime of his debtor, and creditors without liens could not have complained. The death of the debtor has wrought no

change in the rights of the parties, and appellant is therefore still entitled to the benefit of the pledge given as his security.

For these reasons we are of opinion that the chancery court erred in holding that the writing in question created no lien upon the real estate mentioned therein, and in sustaining the exceptions taken by the general creditors to the report of the commissioner finding the amount due appellant to be a preferred charge upon the lands designated as security therefor.

The decree appealed from must, therefore, be reversed, and this cause be remanded to the chancery court of the city of Richmond, to be there proceeded with in accordance with the views herein expressed.

MORTGAGE—EQUITABLE—WHAT CONSTITUTES—TRUST DEEDS.—A lien created by contract, and not sufficient as a legal mortgage, is generally regarded as in the nature of an equitable mortgage. The form of the contract is immaterial, provided the intent to create a security appears: *Wood v. Holly Mfg. Co.*, 100 Ala. 326; 46 Am. St. Rep. 56, and note; *Bell v. Pelt*, 51 Ark. 433; 14 Am. St. Rep. 57; *Peers v. McLaughlin*, 88 Cal. 294; 22 Am. St. Rep. 306. See monographic note to *Hutzler v. Phillips*, 4 Am. St. Rep. 696-708. A trust deed, though not sufficient to pass the legal title for want of a trustee, as a formal party, was held sufficient as an equitable mortgage in *Bensimer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774.

CRABTREE v. OLD DOMINION BUILDING AND LOAN ASSOCIATION.

[95 VIRGINIA, 670.]

BUILDING AND LOAN ASSOCIATIONS—USURY.—A contract or agreement between a borrowing member and a building and loan association by which it loans him one thousand dollars and issues him twenty shares of its stock, and he pledges them and mortgages real property as security and pays into its treasury seventeen dollars monthly, of which five dollars are for interest, two dollars for an expense fund, and the balance for a loan fund, is usurious, when the rate of interest allowed by law is but six per cent per annum.

BUILDING AND LOAN ASSOCIATIONS—USURY.—If there is no charter specially authorizing the chartering of building and loan associations, and they are, therefore, incorporated under general laws, contracts usurious when made by other corporations or individuals are none the less usurious when made by such corporations.

BUILDING AND LOAN ASSOCIATIONS.—THE RELATION BETWEEN THE MEMBERS of an incorporated building and loan association is not that of partners. Contracts between them and the association constitute loans of money, and are, therefore, subject to the law defining usury.

STATUTES — RETROACTIVE — CONSTRUCTION AS AGAINST.—Courts will not construe a statute so as to give it a

retroactive effect, unless there is something on the face of the enactment putting it beyond doubt that such was the purpose of the legislature. Therefore, a statute authorizing building and loan associations by their by-laws to fix the premium or bonus at which they will dispose of money in their treasury does not remove the taint of usury from transactions entered into before its passage.

BUILDING AND LOAN ASSOCIATIONS—RELIEF FROM A USURIOUS CONTRACT WITH.—Where a borrowing member of a building and loan association enters into an agreement, which is deemed usurious, he cannot, on his default in the payments stipulated for, be charged with fines on account of such defaults, nor can he be charged with any interest while in default. He is entitled to have deducted from the amount of his loan the interest and the monthly dues paid by him on his stock in the association.

USURY—APPLICATION OF PAYMENTS.—Under the statutes of Virginia, if payments have been made upon a bond in which usurious interest has been reserved, and the borrower himself applies the payment to the interest or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless, within one year thereafter, suit is instituted by the borrower or a suit is brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued.

I. H. Larew, for the appellant.

T. L. Massie, William C. Preston, and B. Rand Wellford, for the appellees.

⁶⁷¹ KEITH, P. The appellant filed his bill in the circuit court of Pulaski county, praying an injunction to the sale of a house and lot conveyed by him to Wysor and Massie, trustees, to secure to the ⁶⁷² Old Dominion Building and Loan Association a certain bond executed by him on the twenty-fifth day of April, 1890, for the sum of two thousand dollars, upon which there was alleged to be due six hundred and seventy-five dollars and thirty-seven cents. The injunction was awarded. The bill of complaint was subsequently answered by the association and the trustees, and upon the issues thus raised a final decree was rendered, ascertaining the amount due by the appellant, and directing the sale of his property unless it was paid within thirty days. From this decree an appeal was allowed.

The facts to be considered are as follows: On the 25th of April, 1890, Crabtree, the appellant, took twenty shares of stock in the Old Dominion Building and Loan Association, and borrowed from it the sum of one thousand dollars, which he secured by the surrender of his stock, and by executing a bond in the penalty of two thousand dollars, conditional to pay seventeen dollars monthly on said loan, and such fines as might be imposed upon him in accordance with the by-laws of the association. The sum of seventeen dollars, payable monthly, was

composed of five dollars interest, and sixty cents per share, which was apportioned upon the books of the company in the ratio of ten cents per share, or two dollars per month, to the expense fund, and fifty cents per share, or ten dollars per month, to what was known as the loan fund. These sums of five dollars interest, ten dollars to the loan fund, and two dollars to the expense fund, aggregating seventeen dollars, were paid each and every month by the borrower, commencing with the date of the loan. The period within which the shares would mature—that is, would be worth one hundred dollars each—was an uncertain one, but the association agreed with the borrowers that they should be required to make monthly payments of dues for only a period of eighty-four months, in the event that their stock had not matured within that time. It appears from this statement that, upon the money borrowed by appellant, he paid, in addition to interest, the monthly sum of twelve dollars into the treasury of the association. At the end of forty-two months he had paid to the company, in addition to the interest upon the sum loaned, the amount of five hundred and four dollars, and if a debit and credit account had been kept between him and ⁶⁷⁸ the association the principal of the debt would have been reduced by that amount plus the average interest upon the monthly sums thus paid. While the amount reserved as interest upon the original loan was only six per cent, that rate was charged and paid upon a constantly diminishing principal, so that, unless this transaction, by virtue of having been made with a building and loan association, is to have a different rule applied to it from that applied to contracts between individuals, or between individuals and other corporations, it must be regarded as usurious; for, stripped of all disguise, it was but a loan of money from the building and loan association to the appellant, for which he was required to pay a rate of interest in excess of that allowed by law.

But it is said, in the first place, that this is a building and loan association, chartered under the laws of the state of Virginia, and that, while it was not authorized to charge more than six per cent interest as such, its members could be required, by virtue of the authority derived from its charter, to pay dues and fines to be ascertained and regulated by the by-laws of the company.

The Old Dominion Building and Loan Association was organized under a charter granted by the circuit court of the city of Richmond by virtue of section 1145 of the code, by

which the courts are authorized to grant a charter of incorporation to "any five or more persons who shall desire to form a joint stock company for the conduct of any enterprise or business, which may be lawfully conducted by an individual, or by a body politic or corporate," with certain exceptions named in the statute which need not be here enumerated. There was, at the date of this statute, February, 1890, no law expressly authorizing the formation of building and loan associations. Such an act had been passed as early as 1852, but it does not appear in the code of 1887, and, being a law of a general nature, was repealed by section 4202. The charter granted to the Old Dominion Building and Loan Association is subject to the general ⁶⁷⁴ laws of the commonwealth. An association organized under section 1145 cannot vouch its charter to justify or excuse any violation of the law upon the subject of usury. Contracts usurious if made by any other corporation or by an individual are none the less usurious when made by an association acting under a charter granted by a court.

Usury is the creature of statute law, and the legislature alone can relieve against it. It is contended by the appellee, however, that the transaction under investigation is not usurious; that the relations between the members of the association is essentially that of partnership, and that the transactions between them do not constitute loans of money, but are, in effect, a mere agreement of partners that their joint contribution shall be advanced for the use of one or another of the members. This was the doctrine announced in *Silver v. Barnes*, 6 Bing. 180. There are notable differences between *Silver v. Barnes*, 6 Bing. 180, and the case before us. One is, that in that case the loans were made to members at premiums offered on competitive biddings, while here under another name—that of a loan and expense fund—a fixed unvarying, monthly installment of sixty cents is required upon each share of the stock held by the borrower. There are also other differences. We are aware that that case has been followed in Massachusetts, New Hampshire, Pennsylvania, and perhaps other states, and has never been expressly rejected in Virginia. It seems to us, however, to be so free from doubt that the transaction before us is, in its essence, a loan of money, for which the borrower pays more than the rate of interest allowed by law, that we are unable to accept the theory of partnership as relieving it from the penalties incident to a usurious transaction. We have considered it the received doctrine in this state, though not hither-

to expressly declared, that building and loan associations existed and carried on their operations only by virtue of legislative authority, and were thus authorized or permitted to deal with their members in a manner that would be deemed usurious if resorted to in ordinary business affairs.

⁶⁷⁵ In *White v. Mechanics' Bldg. etc. Assn.*, 22 Gratt. 233, this subject was investigated, and, while not expressly decided, the opinion leaves little reason to doubt that the charge of usury would have been sustained had not the association been protected by its charter, which derived its authority from the act of May, 1852. Judge Anderson says that he was strongly inclined to the opinion that the transaction was usurious, but finally determined to concur in the opinion that it was authorized by the statute, and therefore could not be usurious. And, again, Judge Anderson says, at page 245: "If the transactions and dealings of this association with its members are warranted by statute, and that statute is warranted by the constitution, though they may operate harshly and oppressively, it is not the province of the courts to relieve. The fault is in the law, which the legislature alone can alter, or in the improvidence of the party, which neither the legislature nor the courts can remedy."

In *Pfeister v. Wheeling Bldg. Assn.*, 19 W. Va. 710, Judge Green, after an elaborate and careful review of a large number of cases, English and American, bearing upon the subject, reaches this conclusion: "When the building association is unincorporated, and therefore a partnership, the weight of authority is, perhaps, in favor of holding that a share redeemed by the association should be regarded, not as a loan, but as an advancement made out of the partnership assets, though the courts which hold this would doubtless hold that if it should be found that this mode of doing business was in truth and fact a mere cover to effect loans at illegal interest, such a redemption of shares by such unincorporated building association would be regarded as a loan: See *Shannon v. Dunn*, 43 N. H. 198. But there is, as we have seen, highly respectable authority which holds that the redemption of a share by an unincorporated building association should of itself be regarded as a loan, and not as a purchase of the interest of the member, or as an advancement to him out of the partnership funds; and, it seems to me, this view is sustained by the weight of reason. That this redemption, ⁶⁷⁶ in the usual way, of a share in an unincorporated building association, could not be regarded as a purchase by the

other partners of the interest of the redeemed member in the partnership would seem clear because he admittedly remained a partner, and had a voice as a partner in the management of the concerns of the partnership. Nor, it seems to me, can it with propriety be regarded as an advance to him as a partner out of the partnership funds of a part or of the whole of his profits, or anticipated profits. If this were the transaction, there would be no requirement of him to pay interest on what was advanced to him, as it assumed that this advance is only a payment on his profits in the partnership. The payment of interest seems to me to give to this transaction the character of a loan."

While, therefore, this case may be distinguished from that of *Silver v. Barnes*, 6 Bing. 180, we do not propose to rest our decision upon any such nice discrimination, but, relying, upon the views expressed by the court in *White v. Mechanics' Bldg. Assn.*, 22 Gratt. 233, and upon the conclusion reached by the supreme court of West Virginia, just cited, we feel warranted in refusing to yield to the doctrine enunciated in *Silver v. Barnes*, 6 Bing. 180, though supported by decisions of courts of the highest respectability.

The association claims that whatever doubt may have existed as to its powers under its original charter has been removed by the act entitled, "An act to define the powers and limitations of building and loan associations," approved March 1, 1894 (Acts 1893-94, p. 560), which provides that any number of persons, not less than five, may hereafter form a building and loan association for the purpose of encouraging industry, frugality, and home building and saving among its members, as provided in section 1145 of the code; and declares that building and loan associations heretofore chartered and incorporated by said section, or any general or special act, or under the laws of any other state, which have complied with the laws of this state, shall have and enjoy certain powers and privileges therein enumerated. They are authorized to fix by their by-laws the premiums or bonus at which they will dispose ⁶⁷⁷ of the money in their treasury, and lend to any member the value of any shares held by him, less such premium or bonus.

If the transaction under investigation had been subsequent to the passage of that act, the question presented to us would have been quite a different one from that which we are called upon to decide. Courts will not construe a statute so as to give it a retroactive effect, unless there is something on the

face of the enactment putting it beyond a doubt that such was the purpose of the legislature. Upon this point, says Judge Staples, in *Danville v. Pace*, 25 Gratt. 4, 18 Am. Rep. 663, "there can be no solid ground for controversy." Viewing the act of 1894 in the light of this canon of construction, and conceding, for the sake of the argument, the amplest power to the legislature to give validity to transactions which might be otherwise impeached as usurious there is nothing which requires or would justify us in giving such a construction to the statute under consideration. It, without doubt, sanctions and ratifies charters of building and loan associations theretofore granted by courts under section 1145 of the code, and confers upon them many privileges; but not one word is said as to their past transactions. What they may do in the future is carefully laid down, but with respect to the past the statute is silent, and the legal effect of what had been done under charters theretofore obtained is left to be determined by the general law unaided and unaffected by that act.

Having reached the conclusion that the transaction between the appellant and the Old Dominion Building and Loan Association was usurious, and that the sting of illegality has not in any manner been removed, it remains for us to consider the relief to which the appellant is entitled under the circumstances of this case.

From the date of the loan in April, 1890, up to and including January 25, 1894, the appellant seems to have paid the interest and dues, aggregating seventeen dollars monthly. At the last-mentioned date his ability or willingness to pay seems to have been exhausted, and from that time on he paid nothing, and by reason ^{of} his default was fined ten cents a month on each share of his stock, making in the aggregate for twenty-one months of default the sum of forty-two dollars. When the trustees were directed to sell, the account between the association and appellant was stated. He was charged with one thousand dollars advanced, with interest thereon to October 25, 1895, and with fines and dues and insurance premiums to the same date, making an aggregate of fourteen hundred and one dollars. He was credited by the amount of interest and monthly dues of sixty cents per share upon each share of his stock, the aggregate of these monthly dues so paid being denominated in the association's statement of its claim as "withdrawal value of stock." These payments of interest and dues, together making the sum of seven hundred and twenty-five dol-

lars and sixty-three cents, deducted from the fourteen hundred and one dollars leaves a balance of six hundred and seventy-five dollars and thirty-seven cents, payment of which is demanded by the association of Crabtree.

Treated as a transaction between the building and loan association and one of its members, the account seems to be correctly stated; but as an account between a debtor and creditor, it is not correct. The balance should have been struck at the date of the last payment, which was the twenty-fifth day of January, 1894, and, the transaction being usurious, no interest accrued upon it from that date until the balance was ascertained, and a decree upon it rendered, and there could, of course, be no accretion of dues, and no assessment of fines. The circuit court should have ascertained the amount due on the loan by applying the credits of interest and "withdrawal value" (so-called) of the stock in accordance with the association's statement of its demand, and then have decreed for the balance due with interest from date.

This brings up the question of the application of payments upon usurious contracts, a subject which was fully considered and finally disposed of by this court in the case of *Munford v. McVeigh*, 92 Va. 446, where it was held: "Where payments have been made upon a debt upon which a greater rate of interest than that allowed by law is reserved in the contract, or received in order to secure the forbearance of the lender, and the borrower himself applies the payment to the interest, or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless within one year thereafter a suit be instituted by the borrower for its recovery, or a suit be brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued."

This suit was not instituted until December, 1895, nearly two years after the last payment was made by the appellant, in January, 1894. More than a year having elapsed, the limitation prescribed by section 2823 had attached, and the court was powerless to disturb the application of payments made by the parties.

For the foregoing reasons, the decree of the circuit court must be reversed, and the cause remanded to be proceeded with in accordance with the views expressed in this opinion.

BUILDING AND LOAN ASSOCIATIONS—CONTRACTS OF—WHEN USURIOUS.—Transactions between building and loan asso-

clations and their borrowing stockholders are simply loans, and are usurious if they require the payment of more than the amount loaned and legal interest: *Note to McCauley v. Building etc. Assn.*, 56 Am. St. Rep. 822. Penalties, premiums, or fines amounting to more than legal interest, and imposed for the nonpayment of money, are usurious: *Meroney v. Atlanta Bldg. etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841, and note. In determining whether a contract is usurious, its substance and effect, not its form, are material: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194. See monographic note to *Delano v. Wild*, 83 Am. Dec. 612-614, as to when contracts of building and loan associations are usurious.

BUILDING AND LOAN ASSOCIATIONS—STATUS OF MEMBERS.—When a building and loan association is unincorporated, the members are liable as partners; but, as a general proposition, the extent of the liability of a member of a building and loan corporation is his stock interest: See monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 155, on the law of building and loan associations.

STATUTES—WHEN GIVEN RETROACTIVE EFFECT.—A fundamental canon of construction is, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature: *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94, and note; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684.

WARE v. BANKERS' LOAN AND INVESTMENT CO.

[95 VIRGINIA, 680.]

USURY—PLACE OF CONTRACT.—If a corporation, organized and doing business in one state, loans money in another and there receives a note secured by a mortgage on property situate therein, and the note stipulates that the principal and interest shall be payable to the corporation at its office in the state of its residence, the contract is a contract of such state, and is not usurious where the rate of interest is not forbidden by its laws, though in excess of that permitted by the laws of the state where the note and mortgage were made and where the land is situated. The fact that the corporation had an office in the latter state, where payment of interest or of principal could have been made, is immaterial.

Scott & Staples, for the appellant.

Cocke & Glasgow, for the appellees.

⁶⁸¹ **KEITH, P.** This suit was begun in the circuit court of the city of Roanoke by J. M. Ware to enjoin the sale of certain real estate conveyed by him to secure the Bankers' Loan and Investment Company the payment of a bond with collateral condition for the sum of \$1,500. In the circuit court the appellee recovered \$1,114.70, with interest, from the 18th of May, 1896; and thereupon Ware applied for and obtained an appeal from one of the judges of this court.

The appellee, under rule 9, asks to have the errors committed against it corrected in this court.

The first question to be considered is, whether the appellee brings it within the jurisdiction of this court to grant the relief asked for. The decree of the court below, principal and interest, on the day upon which it was rendered, amounted to \$1,170.40. The property was advertised to be sold for the payment of a debt, ascertained as of the 30th of April, 1895, of \$1,462.46. To this the circuit court should have added, according to the contention of the appellee, premiums and interest from the thirtieth day of April, 1895, to the 16th day of March, 1897, \$330, making an aggregate of \$1,792.46, from which deduct the decree given by the circuit court, and the sum of ⁶⁸² \$622.06 is the sum put in controversy under rule 9 by the cross-appeal.

The circuit court held that the contract entered into was a Virginia contract, and usurious. The contention here is, that it was a New York contract, valid according to the laws of that state. The bond was given by James M. Ware, of the city of Roanoke, to the Bankers Loan and Investment Company, a corporation incorporated under the laws of the state of New York, in the penal sum of \$3,000, to be paid to the said company, its officers or assigns, at the office of the company in the city of New York. The condition of this obligation is, that Ware, having obtained a loan of \$1,500 by way of anticipation of the value of fifteen shares of the capital stock of the company, had thereby become liable, in accordance with the articles and by-laws of said company, to pay a premium of fifty cents per share per month, and the monthly installment of interest, making premium and interest \$15 per month during the continuance of the loan, which he had bound himself to pay to the company, its successors or assigns, "at its office."

If Ware performed all the various conditions required of him according to the tenor and effect of his bond until the fifteen shares of stock became fully paid, and of the value of \$100 per share, then the obligation entered into was to be void, otherwise to remain in full force and effect. The \$1,500 advanced was paid to the obligee in Virginia, and its payment was secured by a lien upon real estate in Virginia.

In the case of Crabtree v. Old Dominion Bldg. etc. Assn., 95 Va. 670, ante, p. 818, we reached the conclusion that under the laws of this state dealings like those disclosed by the record between Ware and the building association are usurious, unless authorized by a charter granted by the legislature. It was there

declared that the theory of a partnership among the members of a building association could not be invoked to sanction practices otherwise usurious, and the authority of the case of *Silver v. Barnes*, 6 Bing. 180, and of the courts ⁶⁸³ which followed that decision, was denied. It is also decided in that case that the act of 1893-94, page 560, had no retroactive operation which would validate what had been done by building associations previous to its passage.

In the case of *National Bldg. etc. Assn. v. Ashworth*, 91 Va. 706, the opinion of Judge Buchanan deals with a contract entered into with a corporation organized under the laws of the state of New York, as is the case here. There, too, the money for the loan of which the bond was given was paid to the obligee in the state of Virginia, and its repayment was secured by a deed of trust upon realty in this state. It there appears that the contract was concluded in Virginia, and all the papers with respect to it executed and delivered here. The bond, however, and all interest, monthly premiums, and dues were payable at the office of the association in New York. The court held that it was a New York contract, and as such was to be governed by the laws of the place of performance, without regard to the place at which it was written, signed, and dated, with respect to its nature, interpretation, validity, and effect: 1 *Daniel on Negotiable Instruments*, sec. 865; *Andrews v. Pond*, 13 Pet. 65.

It is claimed, however, by this appellant that the premiums and dues were not by his contract payable in the city of New York. The principal of the loan is declared in terms to be payable to the company "at its office in the city of New York," while, in the condition of the bond, all premiums and dues are made payable to the company "at its office," an expression which it is claimed applies as well to its office in the city of Roanoke as to its office in the city of New York. We do not think that the instrument bears any such construction. Having spoken of "its office in the city of New York," a subsequent reference "to its office" could only refer by fair and natural interpretation to the New York office. It is true that the company had an office in Roanoke, as it appears to have had elsewhere, at which payments could be made and receipts given for premiums and dues, but this was a mere matter of convenience—⁶⁸⁴ of convenience alike to the company and its members. It was not a part of the contract, and can have no influence in determining its character or place of execution.

In *Nickels v. People's Bldg. etc. Assn.*, 93 Va. 380, the money

was received by Nickels and expended upon the improvement of real estate in Virginia, where he resided; but the by-laws of the association required the payments to be made to the secretary of the association at its principal office in Geneva, New York. Nickels, as a member of the association, was held to have notice of this by-law; and it was further held that where parties enter into a contract lawful in New York and usurious in Virginia, the presumption is, that they contracted with reference to the laws of that state which recognized the legality of the transaction. Men are presumed in their contracts to respect rather than to violate the law.

Appellant contends that the naming of New York as the place where the contract should be performed was a mere shift to evade the usury laws of this state. There is no artifice which the ingenuity of man can conceive by which a usurious transaction can be shielded from the scrutiny of the courts; but they do not lightly impute the vice of usury to a contract. It is forbidden by the law, and severe penalties are imposed upon those who practice it; but while the courts will be hindered in their search by no device, however ingenious, the proof of usury must be clear and satisfactory: *Brockenbrough v. Spindle*, 17 Gratt. 33. In that case Judge Moncure says, "that to convict a person of usury it must be proved beyond a rational doubt to the contrary." That decision was rendered when the law avoided an usurious contract, and, the penalty under the present law being less severe, it is claimed that the proof exacted should be less cogent. The character of the transaction is unchanged. It is still a violation of the law visited by penalties identical in kind, though differing in degree, from those imposed under former statutes. The rule of evidence, therefore, remains unchanged, ⁶⁸⁵ and the proof of usury must still be clear and satisfactory.

As we have seen, no device, however specious, can hinder an inquiry by the court into the true nature and character of the transaction. If, then, a contract made in this state is by agreement of the parties to be performed elsewhere, and the court should be satisfied that the place of performance had been selected as a mere shift to evade the usury laws of this state, it would be stripped of its disguise, and subjected to the penalties which the law denounces against the offense. But a New York association, organized under the laws of that state, authorized by its charter and by-laws to enter into the contract under investigation, and capable of contracting in any jurisdiction, whether the rate of interest in the place of contract be greater or less

than is allowed by the laws of New York, cannot be deemed to have selected that state, the state by which it was created, and where it is domiciled, as the place where its contract should be performed as a shift to evade the usury laws of this state, not, at least, without convincing proof of the fact.

Upon the authority of *National Bldg. etc. Assn. v. Ashworth*, 91 Va. 706, and *Nickels v. People's Bldg. etc. Assn.*, 93 Va. 380, before cited, we are of opinion that the contract in this case was entered into with reference to the state of New York as the place of performance; that the evidence does not prove that the place of performance was determined upon as a shift or device to cloak an usurious transaction; and that, under the laws of the state of New York, the contract between the appellant and appellee was not usurious.

Having reached this conclusion, it is unnecessary to consider the errors assigned by appellant.

An order will be entered reversing the decree of the circuit court for error to the prejudice of the appellee, and remanding the cause for further proceedings in accordance with the principles declared in the foregoing opinion.

USURY—CONFLICT OF LAWS.—A contract made by a resident of one state, who applied to become a member of a loan association situated in another state, to pay it money at the place of its residence, is to be governed by the law of the latter place as to usury, although the contract was made through an agency situated within the state of the residence of such member and the payment of the money is secured by a mortgage on land therein: *Bennett v. Eastern etc. Assn.*, 177 Pa. St. 233; 55 Am. St. Rep. 723, and note. See, also, *McGarry v. Nicklin*, 110 Ala. 559; 55 Am. St. Rep. 40, and monographic note on the place of the contract, at page 50.

HARRISON v. WALLTON

[95 VIRGINIA, 721.]

INFANTS—RIGHT OF, TO SHOW CAUSE AGAINST A DECREE.—A statute giving infants six months after coming of age to show cause against a decree or order does not prevent them from asserting their rights by a next friend before attaining their majority.

RES JUDICATA—SECOND ACTION INCONSISTENT WITH A PRIOR JUDGMENT.—The proceedings in a cause not only bar a second suit between the same parties or their privies upon the same claim or demand, but they also bar a suit between the same parties or their privies upon a different cause of action, if it appears that the issue presented in the later suit was involved and determined in the former. Hence, if in a suit against the executor and

infant heirs of an estate a claim is established against it, such heirs cannot maintain a subsequent action against the executor on the ground that the claim so established did not exist or was excessive, and he therefore ought to have defeated it.

AN INFANT IS BOUND BY A DECREE against him as much as a person of full age, and can impeach it only upon grounds which would invalidate it if against an adult.

JUDGMENTS—PERSONS NOT IN BEING, WHEN BOUND BY.—If all the persons in being having an interest in real property are before the court, they are regarded as representing those coming after them with contingent interests, and such persons, when they come into being, are bound by the judgment against those who thus represent them.

JUDGMENTS—RELIEF FROM—PARTIES ESSENTIAL IN A SUIT FOR.—Parties whose rights might be affected by setting aside a decree are necessary parties to a suit by them for that purpose.

RES JUDICATA.—Where the validity of a claim against the estate of a decedent is established by a decree against the executor and heirs, there can never be a recovery in a subsequent suit on the ground that the claim was invalid, while the former decree remains in force.

PRACTICE WHERE ONE OF SEVERAL DEFENDANTS FAILS TO APPEAR.—If one of two defendants establishes a defense not personal to himself, but going to the foundation of the plaintiff's right to recover, such defense operates in favor of another defendant, though the latter does not answer nor otherwise appear in the suit.

E. P. Buford and Pollard & Sands, for the appellants.

George Mason, for the appellees.

⁷²² **BUCHANAN, J.** This suit was brought by the appellants, the children of Sallie E. Harrison, against their mother and Robert Turnbull in his own right, and as executor of M. R. Wallton, deceased, for the purpose, as stated by the appellants in their petition for appeal, of charging the executor with the devastavit of the estate of his testatrix occasioned by his misconduct in the case of Harrison and wife against Wallton's executors and others.

The suit of Harrison and wife was instituted by the father and mother of the appellants against the appellee, Turnbull, as executor of Mrs. Wallton, and three of the appellants, all that were then in being, to ascertain the indebtedness of Mrs. Wallton's estate, and to make sale of so much of the real estate left by her as might be necessary to pay the debts.

⁷²³ A history of the proceedings in that case, and of the misconduct of the executor relied on to show that he was guilty of a devastavit, is set out in the bill in this case, and with it are filed copies of portions of the record in that case, viz., the bill and its exhibits, the answer of the guardian ad litem, the decree of the

court directing one of its commissioners to take an account of the debts of the estate and their priorities, and to report what portion of the real estate could be sold to pay off the debts, extracts from the commissioner's report, the decree confirming it and directing sale of the land, the report of sale made by the commissioner to sell, the decree to sell enough of the personal estate to pay the residue of the debts remaining unpaid after exhausting the proceeds of the sale of the land upon certain conditions, the report of the commissioner showing the payment of the debts of the estate, and the completion of his duties as commissioner, and the final decree approving that report and striking the case from the docket.

The appellee, Turnbull, in his own right and as executor, demurred to the bill, and, upon a hearing of the case upon the demurrer, the court dismissed the bill, without prejudice to the rights of the appellants, under section 3424 of the code. From that decree this appeal was taken.

If, as the appellants contend, the court sustained the demurrer to their bill because they could not bring suit to assert their rights until they became of age, it erred. Section 3424 of the code allowing an infant, within six months after he becomes of age, to show cause against a decree or order in certain cases, does not prevent him from asserting his rights whilst an infant by a next friend as soon as he sees fit to do so: *Richmond v. Taylor*, 1 P. Wms. 733, 736, 737; 1 *Daniell's Chancery Practice*, side, p. 173; Judge Carr, in *Tennent v. Pattons*, 6 Leigh, 208.

The grounds relied on here by the appellee to sustain his demurrer are, that the bill and exhibits in this case show that all matters about which complaint is now made were adjudicated ⁷²⁴ and finally settled in the case of *Harrison and wife v. Wallton's executor*, et cetera, and that these matters, being *res judicata*, cannot be inquired into and made the subject of litigation in a collateral proceeding, as is attempted in this case.

The injuries complained of, and for which the appellants seek compensation, resulted, as is alleged, from the gross negligence and misconduct of the executor in allowing the claims of Mrs. Harrison to be established as a debt against the estate of her mother, when, in fact, there was nothing due her, and from injuries arising from the subjection of the real estate primarily to the payment of that and other debts due from the estate instead of first subjecting the personal estate to their payment. The bill and exhibits in this case show that both the validity and amount of Mrs. Harrison's debt, and the propriety of subjecting

the assets of the estate to the payment of the debts in the manner in which they were subjected were necessarily adjudicated and settled in that case.

There can be no recovery in this case against the executor without showing that the debt asserted by, and adjudged to be due to, Mrs. Harrison in that case was not due her in whole or in part, or without showing that the manner in which the real estate was decreed to be and was subjected in that case was erroneous. The proceedings in that case not only bar a second suit between the same parties or their privies upon the same claim or demand, but they also bar a suit between the same parties or their privies upon a different cause of action, if it appears that the issue presented in the latter suit was involved and determined in the former suit: *Shumate v. Supervisors*, 84 Va. 574; *Bigelow v. Winsor*, 1 Gray, 299; 1 *Freeman on Judgments*, secs. 253-258. See, also, *Miller v. Wills*, 95 Va. 337; *Miles v. Caldwell*, 2 Wall. 35; *Cromwell v. Sac County*, 94 U. S. 351; *Vanfleet's Collateral Attack*, sec. 17.

Such a judgment or decree is conclusive upon the parties to it until reversed upon appeal, or until set aside or annulled by some proceeding instituted for that purpose.

725 And it is well settled with us that an infant, as a general rule, is as much bound by a decree against him as a person of full age. The law recognizes no distinction between a decree against an infant and a decree against an adult. And therefore it is that an infant can impeach only upon the grounds which would invalidate it in the case of another person, such as fraud, collusion, or error: *Zirkle v. McCue*, 26 Gratt. 517, 528; *Pennybacker v. Switzer*, 75 Va. 678; 1 *Minor's Institutes*, 507, 508.

It is insisted that only those appellants who were in being and were parties to that suit are bound by the proceedings in that case.

Mrs. Wallton had devised and bequeathed all her property, both real and personal, after the payment of her debts, to her daughter, Mrs. Harrison, for life, and at her death to her children then surviving, and the heirs of such of them as might be dead. The children of Mrs. Harrison in being at the time the suit of *Harrison and wife v. Wallton's executor*, et cetera, was brought were made parties defendant, and answered the bill by their guardian ad litem.

The general rule certainly is, that no person is bound by a judgment or decree except those who were parties or standing in privity with others who were parties. But there are excep-

tions to the rule of equal authority with the rule itself: *Baylor v. Dejarnette*, 13 Gratt. 164. It would certainly be unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing his claim because of limitations by way of remainder to persons whom it might be impossible or improper to make parties to the cause. To obviate this difficulty the doctrine of virtual representation has been introduced, by which certain parties before the court are regarded as representing those coming after them with contingent interests: *Baylor v. Dejarnette*, 13 Gratt. 166.

It was said by Lord Redesdale in *Giffard v. Hart, Schoales & 726* L. 407, 408, 686, that where all the parties are brought before the court that can be brought before it, and the court acts upon the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. And this statement of the law is cited with approval by Judge Lee in *Baylor v. Dejarnette*, 13 Gratt. 164, and by Judge Moncure in *Faulkner v. Davis*, 18 Gratt. 651, 690, 98 Am. Dec. 698, where the question is fully discussed.

The appellants who were not in being when the suit of *Harrison and wife v. Wallton's* executor was instituted, and whom it was impossible to make parties to that suit in person, must be regarded as parties to it by representation, and are as effectually bound by the decrees rendered in that cause as if they had been in being and made parties to it in person.

The counsel of the appellants also insist that, if it be necessary to set aside and annul any of the decree in the case of *Harrison and wife v. Wallton's* executor, in order that the executor may be held responsible for the devastavit charged, the averments of the bill in this case and the prayer for general relief are sufficient (treating it as an original bill in the nature of a bill of review) to enable the court to set aside and annul the decrees in that case which would bar a recovery in this.

In all suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. It must be shown in what the fraud consists, and in what manner it has been affected. Where it is sought to set aside or annul a regular judgment or decree upon the ground that it was obtained by fraud practiced upon a party, or upon the court during the trial, or in prosecuting the suit or in obtaining the judgment or decree, it is necessary, it is said, that the bill should state a case which shows actual fraud: *Kerr on Fraud and Mistake*,

353; Patch v. Ward, 3 Ch. App. Cas. L. N. 203. See, also, Milford and Taylor's Pleading and Practice, 190, 191; United States v. Throckmorton, ⁷²⁷ 98 U. S. 61; and that the suit should be brought for the express purpose of impeaching the decree, otherwise it will be regarded as a collateral attack: 2 Freeman on Judgments, 4th ed., 336; 12 Am. & Eng. Ency. of Law, 147 j; Milford and Taylor's Pleading and Practice, 190, 191.

It is clear that this bill was not filed for the express purpose of impeaching the decrees rendered in the former case. Neither do the statements of the bill make a case of actual fraud. This is not contended. The claim is, that it does show a case of constructive fraud, and that this is sufficient.

Whether it is essential, in order that a judgment or decree may be set aside and annulled for fraud, that the suit shall be brought expressly for that purpose, and that the bill shall state a case of actual fraud, it is unnecessary to decide or express any opinion upon in this case, as the bill is fatally defective as a bill for that purpose, in another respect.

None of the purchasers of the lands sold in that case or those who held under them are made parties to this suit, except Mrs. Harrison. The persons whose rights would or might be affected by setting aside the decrees complained of were necessary parties to any suit brought for that purpose, or in which such relief could be granted: Story's Equity Pleading, sec. 420; Harwood v. Railroad Co., 17 Wall. 78; 3 Am. & Eng. Ency. of Pl. & Pr. 620, etc.

We are of opinion that the court did not err in sustaining the demurrer of the executor to the bill, and dismissing the cause as to him. Neither did it err in dismissing it as to Mrs. Harrison, although she failed to appear and make defense. The defense of the executor, her codefendant, was not personal to him. It went to the foundation of the appellant's right to recover upon the case stated.

The bill did not make a case entitling the appellants to relief. It showed that the validity of Mrs. Harrison's debt had been established in the case of Harrison and wife v. Wallton's executor, to ⁷²⁸ which suit they were all parties. The court having jurisdiction both of the subject and the parties, the decrees in this case were a complete bar to a recovery against Mrs. Harrison, as well as the executor, as long as they remained in force: See Cartigne v. Raymond, 4 Leigh, 579; Terry v. Fontaine, 83 Va. 451; Aiken v. Connelly (Va., April 29, 1896), 24 S. E. Rep. 909, 910.

The decree complained of must be affirmed.

JUDGMENT—RES JUDICATA—ESSENTIALS.—To constitute a bar, a former adjudication must have been on what was actually in issue, and the determination of which was essential to the judgment: *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132. A judgment is conclusive on the parties, in a subsequent litigation, as to an issue necessarily decided by the former, although no specific finding may have been made on that issue: *Short v. Taylor*, 151 Mo. 517; 59 Am. St. Rep. 508, and note. A judgment is conclusive as an estoppel so long as it is unopened: *Stevens v. Reynolds*, 143 Ind. 467; 52 Am. St. Rep. 422.

JUDGMENT—PERSONS NOT IN BEING—WHEN BOUND BY. • If an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, represent the whole estate, and stand not only for themselves, but also for the persons unborn, and a judgment entered in such litigation binds their interest, if it provides for and protects them, and also if the court determines that they have no interest to be protected: *Kent v. Church of St. Michael*, 136 N. Y. 10; 32 Am. St. Rep. 693, and note. Compare *Detrick v. Migatt*, 19 Ill. 146; 68 Am. Dec. 584.

INFANTS—RIGHT TO DISPUTE JUDGMENT.—An infant defendant can dispute an absolute decree against him upon such grounds only as an adult might have disputed it: *Ralston v. Lahee*, 8 Iowa, 17; 74 Am. Dec. 291, and note; *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172, and monographic note on judgments against infants.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

BLAIR v. CHARLESTON.

[43 WEST VIRGINIA 62.]

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—LIABILITY FOR DAMAGES.—If the grade of a street has been actually established, and improvements on property have been made with reference to such grade, and the grade is changed by raising or depressing it, and injury results to the property, the municipality must, under a constitutional provision that private property shall not be taken or “damaged” for public use without just compensation, answer for such damage, though the work was free from negligence.

MUNICIPAL CORPORATIONS — STREETS — WHAT CHANGE OF GRADE ENTITLES OWNER TO DAMAGES.—A lot-owner is entitled to consequential damages from a change of the natural surface of a street to a legally established grade, for a change from the natural grade is a change of grade, just as much as a change from a grade previously established by the authorities.

MUNICIPAL CORPORATIONS — STREETS — DAMAGES FOR CHANGE OF GRADE.—A constitutional provision that private property shall not be taken or “damaged” for public use without just compensation does not limit a lotowner, who claims damages occasioned by a change of street grade, to injuries caused by an enlargement or alteration of the street, but covers the whole scope of injury and includes any act working the injury.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE BEFORE ESTABLISHMENT OF GRADE LINE—DAMAGE TO LOT.—If a street of a city or town is a public street, though no grade for it has ever been fixed by the municipality, and is used upon the natural surface grade for any considerable time, and improvements have been made on lots lying upon it, with reference to such grade, before any grade line is established, and the natural surface grade is changed to the injury of such lots, the municipality is answerable therefor in damages.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE AFTER ESTABLISHMENT OF GRADE LINE BUT BEFORE ACTUAL GRADING—DAMAGE TO LOT AND BUILDING. If one purchases a lot in a city or town, on the natural surface grade

of a street, after the municipality has established a grade line, on paper, but before an actual grading to make the street conform to that line, he may recover damages for an injury to his lot caused by such actual grading, but cannot recover damages for an injury to a building erected thereon after the paper grade was adopted, as the building must conform to the grade line.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—THE MEASURE OF DAMAGES for an injury to property arising from a change of a street grade line is such a sum as will make the owner whole; that is, the depreciation of the market value caused by the change of grade. If the fair market value is as much immediately after the change of grade as immediately before, no damages can be recovered.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—RIGHT OF ACTION FOR DAMAGES.—A city or town does not injure a lotowner by establishing the grade of a street on paper, but does injure him when such grade is applied to the ground. It is the direct physical disturbance of a right which the owner had enjoyed in connection with his property that gives a cause of action.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—IN ESTIMATING DAMAGES to property caused by a change of street grade, it is proper to consider the expense of adjusting the property to the new grade, the cost of filling, injury to trees, and the raising of houses, where the damage to houses is included. In fact, all things causing a diminution in the value of the property are to be considered, for the question is, What is the actual loss to the market value of the property?

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—SETOFF OF BENEFITS AGAINST DAMAGES.—In allowing damages to a property-owner for injuries caused by a change of street grade, special or peculiar benefits to his property must be set off against the damages.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—“PECULIAR BENEFITS” to property affected by a change of street grade are those which particularly and exclusively affect the particular property, and include special benefits arising from an enhancement of value. All benefits to the property, local or “general,” by which its market value is kept up or increased, are necessarily to be considered, though other “general” benefits are not to be.

WITNESSES—OPINION AS TO VALUE OF PROPERTY.—In an action against a city for damages caused by its changing the grade of a street, the opinions of witnesses as to the value of the property, before and after the change, are admissible in evidence.

W. S. Laidley, S. C. Burdett, and A. C. Blair, for the plaintiff in error.

Harrison B. Smith and Couch, Flournoy & Price, for the defendant in error.

⁶³ BRANNON, J. America C. Blair brought an action in the circuit court of Kanawha county against the city of Charleston to recover damages for injury to her lot consequent upon grading Morris street, the work placing an embankment of six feet height above the natural surface of her lot, leaving it and her house that much lower than the street, rendering it difficult

of access, causing the lot to be wet, and the cellar to have water in it. Verdict and judgment for city.

The law books tell us that, for grading streets, or changing grade, or other lawful works done by a city or town, no action lies for consequential injuries to adjoining property if the work be done skillfully and not negligently; but we must not be misled by the text of the older books ⁶⁴ in this matter, as they lay down the rule under constitutions saying that private property shall not be taken for public use without compensation, and there can be no liability where merely damage to adjoining property results from the work, but only when the property is taken, or the injury is equivalent to its taking. But our constitution of 1872 added the word "damaged" to the language of the former constitution, so that the clause in section 9, article 3, is: "Private property shall not be taken or damaged for public use without just compensation." Under this change it is settled that, where once the grade has been actually established, and improvements on property have been made with reference to that grade and that grade is changed by raising or depressing it, and damage results to the property, the municipality must answer it, though the work was free from negligence: *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Dillon on Municipal Corporations*, sec. 996 b; *Beach on Municipal Corporations*, sec. 1141. But it is said that this unquestioned rule does not determine the case in hand, for the reason that a system of grades for the city had been adopted long before the plaintiff owned this property, or began the construction of her house upon it, which system was of record in the proceedings of the council, which she knew, or might have known, before acquiring the lot or building. *Morris street* was a public street before the adoption of this ordinance or paper grade, and that grade existed only on paper, or in contemplation, until after the plaintiff purchased, and was then physically established, working the injury sued for. Is it law that the first grading—that is, physical grading—can be done with impunity, no matter how much it hurt the adjoining landowner, and that the constitution gives compensation only when that is abandoned and another grade substituted? Let us view this question as to the land alone, separate from the house. There is the constitution, saying, without any such exception, that the citizen's property shall not be damaged without paying him. But, in applying it, is there reason to make such exception? It may be said that, when the city acquired land for the

street, whether by condemnation, purchase, or dedication, grading and consequent damages were contemplated and included, and thus the owner and his ⁶⁵ alienees are barred from damages. If acquired by condemnation, that would be a defense, as the compensation pays for the land actually taken and damages to the residue. If acquired by purchase or dedication, the seller or dedicator would contemplate, presumptively, a grade following the natural surface; at any rate, not one grievously injuring the residue of his property. Suppose a man sells or gives land for a street. If the grade is at once made, he has no claim. It is opened and used for years on a surface grade, and then a grade is made gravely injuring him. Is there any reason why he should not be compensated? By the use of the street in its natural grade, the city has adopted it, and people may improve with reference to it; and, if it abandon that grade, so used, and substitute another, it ought to be regarded as an alteration of an established grade. Otherwise, landowners must wait indefinitely before improving; for, if they do not, they may be ruined by change of grade. The constitution surely does not mean this.

This question has been up in states having similar provision in their constitution or laws to ours. In *Bloomington v. Pollock*, 141 Ill. 351, the court said that it was immaterial whether such grading was done under an ordinance establishing a grade in the first instance, or under an ordinance abandoning the grade, and the fact that the grade was fixed before the plaintiff's purchase was no defense to an action for damages. In *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648, it is said by the court that the dedicator should only be held to give implied consent to improvements such as would put the street in a condition safe for use on the natural surface, and the syllabus and opinion hold that an owner of a lot is entitled to consequential damages from the change of the natural surface to a legally established grade. Approved in *Hickman v. Kansas*, 120 Mo. 110, 41 Am. St. Rep. 684. In *New Brighton v. United Presbyterian Church*, 96 Pa. St. 331, it was contended that as the owner of ground had laid it out in lots, and the town had never fixed grades, it was not liable for grading the first time, but it was held that a change from the natural grade was such a change as called for damages. The court said: "A change from the natural grade is a ⁶⁶ change of grade, just as much so as if changed from a grade previously made by the authorities. When the borough accepted the street, she took it as

it then was, in width, line, and grade. The statute, in giving compensation, carrying out the constitution, is remedial. It gives damages where none before could be recovered. It should receive a liberal construction to effect its object." In *Jones v. Bangor*, 144 Pa. St. 638, it was held that a landowner who lays out and dedicates a street to public use is not precluded from damages for a change of grade, at least where the change is not made for several years after the dedication, and is an act separate from the opening of the street, as it is in the case in hand. So in *Pusey v. Alleghany*, 98 Pa. St. 522. These principles are approved in *O'Brien v. Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. 832.

But counsel say that the Pennsylvania constitution is that compensation is to be given for damages by construction and enlargement of works, highways, et cetera; covering, thus, the original construction. But I answer that our constitution is intended to cover the whole scope of injury, and include any act working the injury, and that it is not limited to enlargement or alteration. In Missouri, the clause is twice held to give the right to damages when the property is injured "by establishing the grade of a street, or by raising or lowering the grade as previously established": *Hickman v. Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684. The Massachusetts statute gives pay for damages "by reason of any raising or lowering, or other act done in repairing": Mass. Pub. Stats., c. 52, sec. 15. It was held, in *Snow v. Provincetown*, 109 Mass. 123, that where no grade is established, the establishment of one afterward is a change within the statute. (Such was the case here.) And where a street was laid out in 1861, and a grade was established, but the street was not built at such grade, and the city, by repairs and otherwise, recognized the existing grade, and in 1877 the street was brought to the grade originally established, it was held actionable, because this change was not a part of the original construction of the street: *Cambridge v. County Commrs.*, 125 Mass. 529. In *Aldrich v. Board etc.*, 12 R. I. 241, the owner was given damage⁶⁷ for a change of grade, though the first grade had never been formally established by the aldermen. It was enough that the street had been used and worked.

Morris street has been a street, I gather from the ordinance recognizing it in 1872, before that date, and presumably treated by the city as such, and used by the public by a grade of the natural surface or an artificial one. In 1872 a grade line is fixed for it on paper, and commencing work in 1891 or 1892 the street

is by physical grading made to conform to it. If improvements were made on lots before the paper grade line of 1872, while the street was used and recognized by the city on the natural grade prior to 1892, while the city invited improvements upon it by adopting it, and then changed grade physically, where is there reason for excluding lotowners from compensation for damages consequent upon the change of grade? It would be a case falling under the two Massachusetts cases first cited, and under the Illinois, Missouri, and Rhode Island cases.

There is a case in Kansas contra: *Interstate etc. Ry. Co. v. Easley*, 46 Kan. 197. So *Sargent v. Tacoma*, 10 Wash. 212. The case of *Folmsbee v. Amsterdam*, 142 N. Y. 118, is referred to by the city's council as holding that there is no inhibition on grading a street until the grade has been established and graded. There a statute charter made a city liable for change of grade "when the grade of a street has been established and the street graded accordingly." There the very letter required the street to have been established and graded; and, moreover, the case strongly sustains the position I take, as it holds that "to establish the grade of a street, within the meaning of said charter, it is not essential there should be a formal ordinance. It may be established by long use and the acquiescence and recognition of the municipality." In *Dalzell v. Davenport*, 12 Iowa, 437, the letter of the act giving damages limited the recovery to a change from "a grade established by the city engineer," and therefore has no force here. The case of *Henderson v. Minneapolis*, 32 Minn. 319, was based on the law, without regard to the change in the constitution, as the opinion shows. So with *Selden v. Jacksonville*, 28 Fla. 558; 29 Am. St. Rep. 278. It related to a constitution declaring "that private property should not be "taken or appropriated for public use without compensation," not to one having the word "damaged," like ours: *Anderson v. Bain*, 120 Ind. 254, and other Indiana cases cited, are on statutes giving damages in terms for change of established grade. Justice Brewer, in *McElroy v. Kansas City*, 21 Fed. Rep. 257, said, under such a clause, that damage in establishing or lowering or raising a grade was actionable. Upon the above authorities I think it safe to say that, if a street is a public street of a town, though no grade for it was ever fixed by the town, but it is used upon the natural surface grade for any considerable time, and improvements have been made, upon lots lying upon it, with reference to such grade, before any grade line is established, and it is changed to the damage of such lots, the town or city is liable therefor.

But suppose, as in this case, that a grade line be established, and then, before the street is graded to conform to that line, one purchases a lot on it; is he barred from damage for injury to his lot from the change of grade? His grantor, owning before the paper grade, would not be. Shall he be, simply because he purchased? If so, the one is prevented from selling; the other, from buying. The actual change may never be made. The case of *Denver v. Vernia*, 8 Colo. 399, so holds. But I do not think this can be shown by other cases. It is not the making of the paper grade that inflicts the injury, but its application to the ground. It is the direct physical disturbance of a right which the owner had enjoyed in connection with his property that gives a right of action: *Rigney v. Chicago*, 102 Ill. 64 (point 6), approved by Justice Harlan in *Chicago v. Taylor*, 125 U. S. 161. See *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614; 42 Am. St. Rep. 149; *Ogden v. Philadelphia*, 143 Pa. St. 430; *Brown v. Lowell*, 8 Met. 172; *Dillon on Municipal Corporations*, 1225, note. In *Jones v. Bangor*, 144 Pa. St. 638, it was held that it is the physical, not the paper, change which confers the right to damages, and that the damages belong to him who is owner at the time of actual grading; and it is further held, when one becomes owner after the municipality has ordained a change in the grade, the fact that his purchase⁶⁹ is made with the knowledge and understanding, on the part of both vendor and vendee, that the street will be made eventually to conform to the new grade, does not operate to relieve the municipality from liability. In *Page v. Boston*, 106 Mass. 84, one purchased after an ordinance to change grade, and it was held that the purchaser could sue, and was the right one to sue, for damages; he owning at the date of the work: *Lewis on Eminent Domain*, sec. 667.

How is it as to buildings erected after the city has adopted grade lines? The owner erects them with his eyes open to them. The city has the undisputed right to adopt them. If it could not, it would not be able, under such a constitutional provision, to protect itself against immense damages. It may adopt them, and everyone must conform to them, however inconvenient. It is a law-making power. The city cannot grade all streets to the line at once. In *Groff v. Philadelphia*, 150 Pa. St. 594, it was held that, where an owner erected a house on his lot after confirmation of a plan fixing the grade of a street, he was entitled to recover for injury to the lot, but not to the house. So in *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180; 41 Am. St. Rep. 648. An ordinance of Charleston required any

one about to build to get the grade from the city engineer. This is public law of the city, which everyone is bound to know. So it was in Denver; and in *Denver v. Vernia*, 8 Colo. 399, it was held that any one building must conform to the grade line, or, failing, could not recover. I remark that the city law applies to building, prohibiting the act of building without conforming to the grade line. Not so, however, as to buying lots. No prohibition or condition as to that. This is another reason for allowing recovery in one case, not in the other. Therefore, no damage could be allowed Mrs. Blair for injury to buildings. But if, in fact, the plaintiff or her husband made application to the engineer for grade, and he gave the wrong one, any damage as to her improvements, traceable and attributable to the error, would be recoverable.

What is the measure of damages in such cases? Shall there be set off against the damage benefits from the change of grade? What benefits? Benefits peculiar to ⁷⁰ the property, as in condemnation cases, as also those received, in common with others, by this property? The courts seem to ask the question, has the plaintiff's property been damaged on the whole? If so, he gets that damage; if not, he gets nothing. I think the rule laid down in *Stewart v. Ohio River R. R. Co.*, 38 W. Va. 438, is applicable, and as good as we can get. The measure of damages is such a sum as will make the owner whole; that is, the depreciation of the market value of the lot caused by the change of grade. If the fair market value of the lot is as much immediately after the change of grade as immediately before, no recovery can be had: *Lewis on Eminent Domain*, 471; notes to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 118; *Symonds v. Cincinnati*, 45 Am. Dec. 532. In arriving at the result it is proper to consider the expense of adjusting the property to the new grade, the cost of filling, injury to trees, or raising houses, where the damage to houses is included—in short, all things causing a diminution in value of the property: *Omaha v. Kramer*, 25 Neb. 489; 13 Am. St. Rep. 504; note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 114.

But, while damages are to be given the owner, his benefits are not to be forgotten; for we must set off benefits against damages. What benefits? Peculiar, not general, benefits; that is, not benefits which the owner derives from the improvement in common with the public at large, but only such benefits in respect to his property as the law calls "peculiar benefits," since for the general benefits the owner pays taxes along with

others: *James River etc. Co. v. Turner*, 9 Leigh, 313; *Railroad Co. v. Foreman*, 24 W. Va. 662. But the question of what are peculiar benefits is one of difficulty. They are said to be those that particularly and exclusively affect the particular property. This is as near a definition as we can give, but does not solve the exact question in this case. The authorities conflict, or are indefinite. Now, we can clearly say that, if the market value of the property is as much after the improvement as before, no damages can be recovered. But if we apply this rule, we inevitably charge benefits that are given the property by the improvements which are not confined peculiarly to it alone, but benefits which all the property along the line of improvement derives; for, in ⁷¹ fixing the market value after the improvement, it seems impossible to eliminate the advantage conferred on it by the improvement. The market value is its value with that improvement. We must therefore say whether we can charge against damages, not merely benefits limited only to the particular property, as the drainage of a swamp, or greatly better access to it, but also the enhancement of value merely from the property's being on the line of improvement, and enjoyed by it only in common with those along the line of improvement or in close proximity. A street is made where none was before, or is greatly improved, or a road is made through lands before without one, and property along the street or road is greatly enhanced in value, so that it is worth at least as much, yea, more than before. But all persons along the street or road are alike benefited. Shall we take such enhancement of value into consideration? The better opinion is that we must. Indeed, how can we help it, by what process, when we hold that, if the value afterward is as much as before, no recovery for damages can be had? Many authorities tell us that we must consider as general benefits—and not charge against the owner—not only benefits throughout the city or town, but also benefits common to all persons along the line of the improvement. Likely we must so construe *James River etc. Co. v. Turner*, 9 Leigh, 313, and *Railroad Co. v. Foreman*, 24 W. Va. 662. But in *Muire v. Falconer*, 10 Gratt. 17, the opinion says the jury must “show a just regard to the advantages resulting from the passing of the road through the land,” and that the advantages to be excluded are those “derived to the owner in common with the country at large,” thus not excluding from consideration those advantages directly conferred on property along the line of the improvement; leading

us to infer they ought to be deducted from the damages. So in *Mitchell v. Thornton*, 21 Gratt. 179. So in *James River etc. Co. v. Turner*, 9 Leigh, 313, the words "country at large" are used, but the case seems to exclude benefits immediately from the work, shared by all along it. In Illinois the constitution on this subject is like ours. Ours was borrowed from it. In the recent well-considered case of *Metropolitan etc. Ry. Co. v. Stickney*, 150 Ill. 362, it was held that "if property is enhanced in value by reason ⁷² of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less degree, be likewise specially benefited. In other words, it is not such benefits as are special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered." And also that, "if a piece of property is enhanced in value, its enhancement—or, in other words, benefits to the property—cannot be said to be common to any other property especially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties." It is further there held that, where "general benefits," or "benefits in common," and such expressions, are used in the books, it is meant "those general, intangible benefits supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits on properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer general benefit; and so a railroad through a town or the country may be a general benefit, by giving additional facilities for travel and commerce, and thereby be a benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative; and it has always been held that such benefits are not to be considered for that reason." And, also, it was held that "the damage contemplated by the constitution is an actual diminution of the present value or price caused by the construction of the road, or a physical injury to the property that renders it of less value in the market if offered for sale. The test of whether dam-

ages have accrued to the land not taken is whether there has been a diminution in its market value by reason of the proposed improvement. The effect upon the whole tract remaining after part is taken must be considered." And also that ⁷³ "the consideration of benefits by which the land not taken is increased, instead of being diminished, in value, is not the deduction of benefits or advantages from the damages but it is ascertaining whether there is damage or not. It is but the estimation of damages, and seems to be the only just mode of estimating them. If the property is worth as much after the improvement as before, then there is no damage done to same. If the benefits received from the making of the improvement are equal to or greater than the loss, then the property is not damaged for public use. There can be no damage to property without pecuniary loss. If there is no depreciation in value, there is no damage." We think these principles sound. They are supported by eminent authority: *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576; *Atlanta v. Green*, 67 Ga. 386; *Aswell v. Scranton*, 175 Pa. St. 173; 52 Am. St. Rep. 841.

What is said above touching the principles of the case renders unnecessary detailed discussion of instructions. Plaintiff's No. 1 was covered by Nos. 3 and 9 given. I think Nos. 1 and 6 are good. They mention no benefits, it is true, but correctly announce the general proposition that plaintiff, if in fact damaged, is to be made whole. Their ignoring benefits was cured by instructions given for defendant. Plaintiff's Nos. 4, 5, and 7 are bad, under principles stated above, as they ignore benefits to the property from the improvement, simply because like benefits accrue to other property along the street. No. 8 is bad, because it ignores the effect of the establishment of the grade line of 1872. All are bad, because they include lot and buildings, when buildings should be excluded, if built after the establishment of grade line. Defendant's instructions Nos. 1 and 2 are bad; the others, good. Instructions Nos. 1 and 4 of defendant erroneously tell the jury that the grade line would debar recovery both for lot and improvements. Plaintiff's exception to the rejection of evidence of the cost of foundation of storehouse, erected, not only after the city adopted the system of grade lines, but after work had been begun to conform Morris street to its grade, is not tenable.

There is no error in allowing the question, "Tell the jury what effect, if any, the improvement of Morris street in front of this property of Mrs. Blair's had upon ⁷⁴ the value of the

property—whether it is worth more or less after the improvement than it was before.” I do not understand that the objection is because it is opinion. As it is a question of value, opinion evidence is admissible: *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 787 (point 7); 53 Am. Rep. 121; *State v. Welch*, 36 W. Va. 690.

Because of the vice in defendant's instructions 1 and 4, making the 1872 grade line deny all claim for damage to the lot, the judgment is reversed, and a new trial awarded.

MUNICIPAL CORPORATIONS — STREETS — CHANGE OF GRADE—DAMAGES.—If a change in the grade of a street injures an adjoining property owner he is entitled to damages: Note to *Kelly v. Minneapolis*, 47 Am. St. Rep. 611. Damages, in such a case, are recoverable under a constitution declaring that private property shall not be taken or “damaged” for public use without just compensation: Notes to *Markowitz v. Kansas City*, 46 Am. St. Rep. 501; *Jordan v. Benwood*, 57 Am. St. Rep. 869. An abutting lot owner is entitled to damages sustained by such a change in front of his lot, not only where there was a prior established grade, but also when the buildings were erected before any grade was established. He is, however, restricted in his right to recover for the injury to his land alone, and not for injury to his house: Note to *Columbus etc. Coke Co. v. Columbus*, 40 Am. St. Rep. 653. A change from the natural grade in a street is a change of grade: See monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 844, 845, showing that the fact that the grade was fixed by an ordinance passed prior to the purchase of the property, and to the adoption of such a constitutional provision, is no defense to an action by the adjoining property owner to recover damages caused by a change of grade in the street abutting his property. The measure of damages to abutting property arising from a change in the grade of a street is the actual diminution in the market value of the land resulting from such change: *City Council v. Schrameck*, 96 Ga. 426; 51 Am. St. Rep. 146. If the improvement increases the value of the property, as much or more than it may cost the owner to readjust himself to the changed state of things he is not a loser and cannot recover: *Aswell v. Scranton*, 175 Pa. St. 173; 52 Am. St. Rep. 841. The elements of damage for changing the grade of a street include all necessary expenses in changing the grade of the lot to conform it properly to the new grade of the street: Note to *City Council v. Schrameck*, 96 Ga. 426; 51 Am. St. Rep. 148, and note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 846, discussing special and general benefits in such cases.

EVIDENCE—WITNESSES—VALUE OF LAND.—The opinions of witnesses are admissible to prove the value of land in condemnation proceedings: *Leroy etc. Ry. Co. v. Hawk*, 39 Kan. 638; 7 Am. St. Rep. 566, and note.

DAVIS v. TRUMP.

[43 WEST VIRGINIA, 191.]

TRIAL—PLEA OF FORMER JUDGMENT.—It is error to submit a plea of former judgment on the same cause of action, in bar of the plaintiff's suit, to a jury. It must be tried by the court from an inspection of the record.

PLEADING—PLEA OF FORMER JUDGMENT.—If a plea of former judgment is interposed, and the plaintiff admits the existence of the record, that ends the matter, for the plea bars his suit; but, if he wishes to deny it, he should do so by replying that there is no such record, and praying that it be inquired of by the record.

PLEADING—PLEA OF FORMER JUDGMENT.—A plea of former judgment should set forth the portion of the record relied on, so that issue may be properly joined thereon, and the court may examine and compare the record with the recital in the plea.

JUDGMENT—THE FORM OF THE ENTRY of a judgment in the docket of a justice of the peace is to be regarded as immaterial, when the truth is stated so as to be intelligible, especially where all formalities, as to such an entry, are dispensed with by statute.

JUDGMENT—ACTION FOR SAME CAUSE BEFORE ANOTHER JUSTICE.—If a cause of action has already been merged into an intelligible judgment, rendered by a justice of the peace, though defective in form and grammar, the plaintiff should not be permitted to bring another action, against the same parties and for the same cause, before another justice. His proper course is to have the defective judgment corrected by the justice who entered it.

JUDGMENT—SUFFICIENCY OF ENTRY.—The following is a sufficient entry of a judgment by a justice of the peace: "Defendants not appearing, plaintiff demanded judgment for \$112.00 and costs, amounting to \$2.50. Judgment was rendered in favor of plaintiff. C. L. Lester, J. P."

Action by Albert Davis against R. G. Trump and H. S. Morris. There was a judgment for the plaintiff, and the defendants sued out a writ of error.

James H. McGinnis and John W. McCreery, for the plaintiffs in error.

A. P. Farley, for the defendant in error.

192 DENT, J. Writ of error to the judgment of the circuit court of Raleigh county in favor of Albert Davis against R. G. Trump and H. S. Morris for the sum of one hundred and twenty-four dollars, interest, and costs. The facts are as follows: On the twenty-third day of December, 1893, plaintiff brought suit against the defendants before A. W. Warden, a justice of Raleigh county, for the sum of two hundred dollars, evidenced by note. Defendants appeared, and entered three pleas—nil debet, former judgment on same note, and release of R. G. Trump, surety, by the acts and negligence of plaintiff.

After hearing the evidence, the justice gave judgment against H. S. Morris, but dismissed the action as to the surety, Trump. The plaintiff appealed to the circuit court. The same pleas were in, but, so far as the record discloses, no issue was made thereon, other than orally, either before the justice or in court, and the record fails to show that even oral issue was joined. In the circuit court the trial was had alone on the plea of former judgment, to which there was no replication of nul tiel record; but nevertheless a trial was had by a jury on this plea; but, when the defendants offered to introduce the record in support of their plea, and the justice who rendered the judgment, to prove the identity of the same, the court excluded both the justice and his record, and therefore there was nothing the jury could do but find in favor of the plaintiff.

The first error committed by the court was in submitting a plea of former judgment to a jury, and then finally determining it himself by excluding the pleaders' evidence in support thereof. It is elementary law that a plea of this character must be tried by the court by inspection of the record: 2 Tucker's Commentaries, 274. If the plaintiff admits the existence of the record, that ends the matter, for the plea bars his suit. If he wishes to deny it, he does so by replying that there is no such record, which he prays may be inquired of by the record. The plea should also set ¹⁹³ forth the portion of the record relied on, so that issue may properly be joined thereon, and the court may examine and compare the record with the recital in the plea. This is a certain, easy, and fixed rule of practice, and, if complied with, would tend to promote the ends of justice without delay. Neglected, it produces confusion, blunder, and unnecessary costs. To get at the very gist of the case, the only question for the determination of this court is, whether there was such a judgment as the defendants ought to rely upon so imperfectly in their plea, which, however, was not objected to for uncertainty and insufficiency. To sustain their plea, the defendants offered the justice's docket, containing the following record:

"Albert Davis,

Plaintiff,

vs.

H. S. Morris and R. G. Trump,

Defendants.

"Plaintiff filed note on defendants for \$200.00 due on 3d of Nov., 1891, after date of note, issue summons against defend-

ants for said amount on 12th day of October, 1892, and made returnable at Callaway's store on the 18th day of October, 1892, and placed in the hands of A. F. Hawley, constable of Trap Hill district, Raleigh county, West Virginia, to be executed and returned at said place by the 18th day of October, 1892. C. L. Lester, J. P."

"Callaway's Store, Raleigh County, West Virginia, Trap Hill district, October 18th, 1892. This cause came on to be heard, summonses returned executed, plaintiff being present. Defendants not appearing, plaintiffs demanded judgment for \$112.00 and costs, amounting to \$2.50. Judgment was rendered in favor of plaintiff. C. L. Lester, J. P.

Justice's costs	\$1 70
Constable's cost	80

Total cost	\$2 50
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"Issued execution on the above judgment on the 20th day of October, 1892, and delivered to A. F. Hawley, constable of Trap Hill district, Raleigh county, West Virginia, to be executed and returned in sixty days from date of execution. C. L. Lester, J. P."

"Execution No. 1 returned before me on the 18th day of February, 1893, showing that a levy on one gray horse, household and kitchen furniture, the property of Dr. H. ¹⁸⁴ S. Morris, to satisfy an execution in my hands in favor of Albert Davis, this, the 25th day of October, 1892, A. F. Hawley, C. R. C. C. L. Lester, J. P."

"Execution No. 2 renewed the 18th day of February, 1893, at plaintiff's request, against H. S. Morris and R. G. Trump, in favor of Albert Davis; levy No. 1, execution transferred to No. 2 execution, this, the 18th day of February, 1893, the execution returned, 'Property not sold.' C. L. Lester, J. P."

"Execution No. 2 renewed to be in full force for 60 days from the 18th day of April, 1893. C. L. Lester, J. P."

"Renewed execution returned before me on the 14th day of October, 1893, showing credit by cash of \$2.10, showing on its face that the property being not sold for the reason that was requested by plaintiff to hold up and not sell. C. L. Lester, J. P."

The justice testified that this judgment was rendered on the same note sued on in the present case. The circuit court excluded this evidence, in effect holding that it did not sustain the defendants' plea; in other words, that there was no judg-

ment. This is certainly a very technical holding, for the record shows that the suit was between the same parties, on the same or similar note, and that the justice, at the instance of the plaintiff, and in the absence of the defendants, gave judgment for the balance claimed to be due, to wit, one hundred and twelve dollars and two dollars and fifty cents costs. Of course, the judgment could have been written out with greater formality, which the justice might do at any time, having at once put all the essentials thereof on his docket. The defendants never objected to this judgment, but admitted its binding force and character. And, if they had, it would have availed them nothing, for, having all the essentials of party, amount, rendition, et cetera, the justice could have extended it, so as to make it just as formal as required by the most fastidious and technical defendant. It is claimed that the plaintiff released the defendant's property taken in execution, and ordered the return of the execution, and then brought a new suit before another justice on the same note, through fear that he would get into trouble because the first judgment was defective. To get out of the open ¹⁹⁵ woods, he wandered into the wilderness. If dissatisfied, why did he not have the justice spread his judgment out more at length? This was unnecessary, for the reason that this court, in dealing with the proceedings or justices, have uniformly conformed to the rule that no defect therein shall render the same invalid if such proceedings are sufficient to show what was intended thereby, especially when collaterally attacked. Sections 178, 179, chapter 50, of the code, among other things, provide that the justice shall enter in his docket the title of the action, et cetera, under which "the judgment of the justice shall be stated, with the items of the costs included therein." Section 180, same chapter, provides that, "so far as the entries in the docket are concerned, the form shall be regarded as immaterial, if the truth is stated so as to be intelligible." This means "intelligible to a person of ordinary intelligence," and not so plain that "a fool who runs may read." The justice is not required to enter the title to the action more than once in his docket, and, if all the orders in such action are immediately under such title, though the entry be at different times, such entries are sufficiently intelligible to be understood by those of ordinary intelligence. Good grammar is not essential to a good judgment. The mistake of a proper tense will not render a justice's judgment unintelligible or invalid. Justices are not usually educated men, learned either in the

intricacies of law or grammar; hence their records must be scanned with the greatest leniency. Such are the provisions of the statute and the holdings of the courts: 1 Freeman on Judgments, sec. 55; Story v. Kimball, 6 Vt. 541; Anderson v. Kimbrough, 5 Cold. 260; Barrett v. Garragan, 16 Iowa, 47; Church v. Crossman, 41 Iowa, 373; Fish v. Emerson, 44 N. Y. 376; Faulk v. Kellums, 54 Ill. 189.

Neither is it proper or just that a plaintiff who supposes that a judgment has been defectively entered in his favor by one justice should be permitted to bring another action for the same cause before another justice. But he should have the defective judgment corrected, which the justice has the right to do, on his own motion, as to any clerical error committed by him, he being his own clerk. "In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by ¹⁹⁶ making the judgment entry fully and correctly show the judgment rendered": 1 Freeman on Judgments, sec. 72. This rule prevails, even though both clerk and court is one and the same person, and it covers mistakes which arise from lack of literary attainment, as well as from inadvertence. Such being the law, there is no reasonable justification for the present suit, the plaintiff's cause of action having already merged into a judgment. The judgment of the circuit court is therefore reversed, and the plaintiff's action is dismissed.

FORMER ADJUDICATION—PLEADING.—An answer setting up a former adjudication must be accompanied by a complete record of all the pleadings and proceedings in the case upon which it is founded: Williamson v. Foreman, 23 Ind. 540; 85 Am. Dec. 475. Former recovery operates as a bar, by way of estoppel, only when specially pleaded: Gray v. Gillilan, 15 Ill. 453; 60 Am. Dec. 761. Such a plea is good in bar, if it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case: Cutler v. Cox, 2 Blackf. 178; 18 Am. Dec. 152.

JUSTICE OF THE PEACE—JUDGMENT—FORM OF.—The record of a justice of the peace should not be scrutinized with severity, and the judgment of a justice's court is not expected to be in perfect form. Matters of form, in such a judgment, are to be overlooked: Freeman on Judgments, 4th ed., secs. 53, 53a.

BUFORD v. ADAIR.

[48 WEST VIRGINIA, 211.]

WITNESSES — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.—If a person deeds his interest in land, with covenants of general warranty, to one who afterward becomes the plaintiff in a controversy over the property, the grantor is interested in the result of the suit, and is incompetent to testify as to any transactions or communications had with parties since deceased under whom the defendants claim title.

TRUSTS—CONVERSION BY TRUSTEE—REPUDIATION—ACCEPTANCE—ESTOPPEL.—If trustees convert a trust property, a cestui que trust has a right to confirm the conversion, and accept the fund in its converted form, or repudiate it and take the original property; but he cannot do both, and must make an election. His acceptance of the property, in a converted form, estops him from afterward demanding the original property.

HUSBAND AND WIFE—DESERTION OF WIFE—EFFECT OF, UPON HER PROPERTY RIGHTS.—If a married woman is deserted by her husband, who goes beyond the limits of the state with no intention of returning, she is thereby restored to all the powers of a feme sole with respect to her separate property.

ESTOPPEL BY DEED, WITH COVENANTS OF GENERAL WARRANTY.—An heir apparent is estopped by his deed, with covenants of general warranty, from afterward claiming his inheritance, and such estoppel extends to his heirs.

ESTOPPEL BY JUDGMENT—DISPUTING MATERIAL FACT.—One who relies upon an adjudication as an estoppel cannot dispute the truth of a material fact on which such adjudication was founded.

ESTOPPEL—NOT BINDING UNLESS MUTUAL—ILLUSTRATION.—An estoppel, to be binding, must be mutual. Hence, if a party to a suit claims title adversely to a former adjudication, not binding on him, he cannot rely on that adjudication as an estoppel against the parties to the former suit.

JUDGMENT—WHEN NOT RES JUDICATA—PARTIES AND SUBJECT MATTER.—A determination, in an action of ejectment, that a will is invalid and cannot pass title to certain land, and that the plaintiff is entitled to only one-half thereof, does not, in a subsequent action of ejectment against different parties to recover the other half, brought by heirs who were not made parties to the first action, estop the parties to the last action from litigating the title as to such other half, or the validity of the will as to the whole.

James W. Caldwell, Alex. F. Mathews, and Logan & Patton, for the plaintiff in error.

John Osborne and L. J. Williams, for the defendants in error.

212 DENT, J. An ejectment suit instituted in the circuit court of Monroe county by N. W. Buford against William Adair et al., resulted in a judgment for defendants. The plaintiff obtained a writ of error. The facts are as follows: Daniel Stoner deceased, on the twelfth day of March, 1845, executed a deed to William Nossinger, trustee, conveying personal and real es-

tate as recited in the deed, "to have and to hold the said tract or parcel of land, and the slaves, bonds and debts, and personal property to him, the said William Nossinger, his heirs or agents by him appointed for the purposes following, That is to say in Trust for the said Matilda Stoner and he the said William Nossinger will & shall permit the said Matilda Stoner during her life to receive and take all the issues rent hires, profits, and interest of the said property, debts, bonds moneys, slaves lands, stock, & apply & do with as she may think proper and the said William Nossinger will permit the said Matilda & the right is hereby given her to dispose of the aforesaid property by will and give such portion thereof as she may think proper to the said Daniel Stoner or the children which they now have or any which they may hereafter have in case the said Matilda Stoner should survive her husband and all of her children. She can dispose of all of the estate as she may think proper. It is further understood that if any of the Children of the said Daniel & Matilda, or any which they may hereafter have, shall marry or arrive of age, that the said William Nossinger shall give to such child, or children such part of the property aforesaid as the said Matilda shall direct. And it is further understood, that if at any time the said William Nossinger should remove from this county or if the said Matilda should wish to have another Trustee appointed in his stead; the said William Nossinger shall appoint such Trustee as the said Matilda shall desire & he the said William Nossinger shall have no further power to act as Trustee of this Deed, & it is further understood, that the said William Nossinger or such Trustee as may be by him appointed is hereby fully authorized & empowered to receive, recover & collect by all lawful means all the property & effects whether real or personal, debts or moneys belonging or owing to the said Daniel Stoner to be applied ²¹³ as above directed." Afterward, by successive conveyances, said Daniel Stoner became the trustee, in lieu of William Nossinger. Daniel and Matilda Stoner had two children—Lucy J., who became the wife of L. C. Thrasher, and Letitia S., who intermarried with one Buford, by whom she had two sons, the plaintiff being one of them, who claims to hold by purchase his brother's interest in the subject matter in controversy. On the thirtieth day of May, 1863, Daniel Stoner, Matilda, his wife, and Letitia S. Buford executed a deed conveying the tract of land, one-half of which is here in controversy, to Leroy C. Thrasher, husband of Lucy J. Thrasher, in consideration of five thousand five hun-

dred dollars, one thousand dollars of which the grantee was allowed to retain for the benefit of his wife. He paid the residue of the purchase money to the grantors, except one thousand three hundred dollars, for which latter sum the land was afterward decreed to be sold, and was purchased by the parties under whom the defendants claim, the balance of the purchase money being received from such sale, and paid to the original grantors. Matilda Stoner died after Letitia S. Buford, leaving a will executed by her in the year 1882, before the death of Letitia S. Buford, by which she devised the whole of said land to Lucy C. Thrasher. She instituted an ejectment suit against the purchasers of said land for the possession thereof, and this court held that the will of Matilda Stoner was void, upon the supposition that Mrs. Buford was alive at the time of the death of her mother, and that the appointment, not having been legally executed, the land descended one-half to Mrs. Thrasher and one-half to Mrs. Buford, and adjudged the one-half of the land then in controversy to Mrs. Thrasher.

The plaintiff herein seeks to recover the other half of said land, as having descended to Mrs. Buford, or, as she was dead at the date of the death of Mrs. Stoner, to her heirs, of whom the plaintiff is the sole representative. The defendants, claiming title under the decree of the court aforementioned, and under Mrs. Thrasher, insist that the power of appointment vested in Mrs. Stoner was properly executed, and that the plaintiff has no interest in the land claimed. Mrs. Thrasher's deposition was taken, and she testified on cross-examination by the plaintiff that Mrs. ²¹⁴Buford and her children received between "three thousand dollars and four thousand dollars of the proceeds of the sale of the land" made to her husband by the Stoners and Letitia Buford; that the money was collected from such sale by her father, from her husband, and invested in land in Wythe County, Virginia, for the benefit of the two children of Mrs. Buford. H. D. C. Buford, one of the children of Mrs. Buford, and who made a deed to the plaintiff for his interest in this controversy, with covenants of general warranty, and who is thereby interested in the result of this suit, in his testimony undertook to contradict Mrs. Thrasher as to this evidence brought out on cross-examination. He is incompetent to testify as to any transactions or communications had with the parties deceased, under whom defendants claim title, and otherwise as to such transactions his evidence is mere hearsay.

The first matter of inquiry that suggests itself is as to the effect of the deed of Daniel Stoner, Matilda Stoner, and Letitia S. Buford to L. C. Thrasher. Daniel Stoner was the trustee holding the legal title to the property in controversy. Besides, he was entitled to an interest by way of appointment; and under the trust, if so directed by Matilda Stoner, their daughters being of age and married, he had the right to convey the property to either of them. Under such circumstances, the trustee and the beneficiaries, with the exception of Mrs. Thrasher, unite in changing the character of the trust estate from realty into a personal fund of five thousand five hundred dollars, one thousand dollars whereof is donated to Mrs. Thrasher, while the remaining four thousand five hundred dollars goes into the hands of the trustee and beneficiary grantee, Mrs. Stoner, who together have the full power of disposal thereof to one or both of these adult married daughters. Where trustees convert a trust property, the adult cestui que trust has a right to confirm the conversion, and accept the fund in its converted form, or repudiate it and take the original property. But he cannot do both. He must make an election. And his acceptance of the property in a converted form estops him from afterward demanding the original property. While the deed might be void as a conveyance, it is an evidential fact showing her acquiescence in the transformation of the trust property, which, ²¹⁵ taken in connection with the evidence that she received a greater benefit from the transformed property than she was entitled to in the original, estops those claiming under her from a recovery of the original property. In other words, during her adult age and marriage, the trustee, by direction of Mrs. Stoner, in whom was lodged the power by the terms of the trust, instead of giving Mrs. Buford the land, or a part thereof, as he was authorized to do by the instrument creating the trust, with her written assent and approval, sold the trust property, and invested for her benefit the proceeds thereof. Now, having gotten these proceeds, her children, on pure legal technicalities, want also the original property. They insist, because this court, in the case of Thrasher v. Ballard, 35 W. Va. 524, above, held, as the facts were then presented, the will of Mrs. Stoner invalid to pass the title to the property, and that it descended to Mrs. Thrasher and Mrs. Buford in moieties, that this determination is *res adjudicata*. In that case the court only held that Mrs. Thrasher was not entitled to the Buford moiety, but did not undertake to determine Mrs. Buford's rights. She was

dead, and her heirs were not parties to the suit; and it was not a binding adjudication as to them, and therefore could not be as to the defendants, who in part claim through her deed.

The validity of her deed, however, is questioned. It is shown in evidence that her husband deserted her in 1859, and never lived with her afterward. At the time of the execution of the deed she was living in Wythe county, Virginia, while he lived in Missouri, where he remarried, whether with or without a divorce is not known, although the witness did not know of a divorce. Mrs. Buford, learning of his remarriage, also remarried. "At the common law, if the husband had abjured the realm, or was an alien residing continuously abroad, these circumstances invested the wife with the protection and powers incident to a feme sole." And the same rule has been extended and applied when the husband resided without the state of the wife's residence, he having deserted her: *Abbot v. Bayley*, 6 Pick. 89; *Gregory v. Pierce*, 4 Met. 478; *Rose v. Bates*, 12 Mo. 30; *Gallagher v. Delargy*, 57 Mo. 29; *Rhea v. Rhenner*, 1 Pet. 105; *Gregory v. Paul*, 15 Mass. 31; *Cornwall v. Hoyt*, 7 Conn. 427; *Arthur v. Broadnax*, 3 Ala. 557; 37 Am. Dec. 707; *Roland v. Logan*, 18 Ala. 307. In *Starrett v. Wynn*, 17 Serg. & R. 130, 17 Am. Dec. 654, the rule of the common law is stated to be that "if a husband deserts his wife, and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion are separate property, and that she may dispose of such property by will or otherwise": See, also, *Love v. Moynehan*, 16 Ill. 277; 63 Am. Dec. 306. It being simply just to the wife that, her husband having deserted her, and gone beyond the limits of the state, with no intention of returning, she, being thus deprived of her marital rights, should be allowed to manage and dispose of her property as though she were a feme sole; otherwise her property would be indefinitely tied up, without benefit to herself or others. In some states, because the statute so provides, a married woman separated from her husband cannot make a good deed for her real estate, for the reason that her husband does not join with her: *Beckman v. Stanley*, 8 Nev. 257; *Maclay v. Love*, 25 Cal. 367; 85 Am. Dec. 133; *Leonard v. Townsend*, 26 Cal. 446. The common law, however, was in full force in this state at the time of Mrs. Buford's conveyance, and, the statute law in no wise affected it, except to provide the effect of a married woman's deed when properly acknowledged; and, when the so-called "married woman's law" was adopted into the code of 1868,

special provision was made therein for the conveyance of a wife's property when living separate and apart from her husband. Mrs. Buford executed the deed as though she were a feme sole. Her only interest affected thereby was a remote, contingent right, which could be released or conveyed by deed, under section 5, chapter 116, of the code of Virginia. And whether sufficient as a conveyance or not, it would operate as an estoppel in favor of a purchaser in good faith, fully complying with the terms of purchase. If good enough to give her the benefit of the purchase money without restitution, it should be regarded as good enough to bar her heirs from questioning the legality of the appointment afterward made by Mrs. Stoner, who undoubtedly made it believing at the time that Mrs. Buford had already received full consideration for, and parted with, all her interest in such appointment. In the case of *Rosenthal v. Mayhugh*, 33 Ohio St. 155, it was held that a deed made by a deserted wife and her ²¹⁷ children, in the absence of the husband, for his property, was sufficient to bar the wife's dower in said property, which was afterward recovered by the returned husband, and of which he died seised. And in the case of *Hart v. Gregg*, 32 Ohio St. 502, it was held that a general warranty deed made by an heir apparent for his expectancy, while void as a conveyance, as being for a mere possibility not coupled with an interest, would act as an estoppel in favor of a purchaser for value in possession. Being binding as to Mrs. Buford, it would be binding as to her heirs, as though it were an advancement made: *Coffman v. Coffman*, 41 W. Va. 8.

But the plaintiff does not claim as an heir of Mrs. Buford, but as heir of Matilda Stoner, insisting that Mrs. Buford died before Mrs. Stoner, and yet he pleads the decision in the case of *Thrasher v. Ballard*, 35 W. Va. 524, as *res adjudicata*. That decision was reached at the instance of those claiming under Mrs. Buford, on the theory that she was alive at the date of the death of Mrs. Stoner, and that for this reason alone she was equally interested in the appointment. The plaintiff now insists that the adjudication of the court is *res adjudicata*, but not as to the facts on which it is founded, and that he is entitled to the benefit thereof, but has a right to show that the main fact on which it is predicated is untrue, and that for this reason he is entitled to the controverted property by virtue of the adjudication, yet in opposition to such fact. In other words, he has the right to assert that Mrs. Buford was dead at the time of an adjudication in her favor, and that the determination was void as

to her, but operated in favor of plaintiff's title derived from another source, and that, while defendants are estopped by the adjudication, plaintiff is not, only in so far as it suits him. The plaintiff, in relying on this estoppel, is also estopped from asserting any facts to the contrary of that on which it is founded. He is thus estopped from denying that Mrs. Buford was alive at the death of Mrs. Stoner. Hence, if he relies on the death of Mrs. Buford before Mrs. Stoner, he cannot rely on the adjudication made on a contrary showing as *res adjudicata*. This, then, would leave the question open, as between the parties to this suit, as to whether the will of Mrs. Stoner is void. The former adverse decision ²¹⁸ was based on the apparent facts which are now made to appear plainly and admittedly to the contrary: 1. Mrs. Stoner's death before Mrs. Buford's; 2. Mrs. Buford's residence with her husband at the time she joined in the deed to L. C. Thrasher; 3. That she had received no portion of the property in the trust; 4. That the appointment was made without her knowledge or consent. If Mrs. Buford was aware of the appointment, and assented thereto, and received her just portion of the property, it does not matter when the appointment is held to have been consummated—whether at the date of the will, or at the death of Mrs. Stoner, although the latter must be conceded to be the proper legal time. It is plain to be seen that, when Mr. and Mrs. Stoner and Mrs. Buford joined in the deed to L. C. Thrasher, their object was to carry out that portion of the trust which provided, "If any of the children of the said Daniel and Matilda, or any which they may hereafter have, shall marry or arrive at age, that the said William Nossinger shall give to such child or children such part of the property aforesaid as the said Matilda shall direct."

The property was more than she wanted to give to either or both the children. That they might give a portion to each, they sold it for a fair consideration to L. C. Thrasher, husband of Mrs. Thrasher, and permitted him to retain one thousand dollars as the portion of his wife, and out of the residue of the purchase money provided Mrs. Buford a portion. But, Thrasher failing, the land was sold to pay the unpaid balance of the purchase money, and thus Mrs. Thrasher was deprived of her portion; and she not having joined in the deed, and not being bound thereby in any way shown in the record, Mrs. Stoner executed the appointment by will, thus securing to her such rights as she might have in the land by reason of not uniting in and being bound by the deed, which afterward, owing to the peculiar

phase the facts assumed, was adjudicated to be a one-half undivided interest by inheritance. From these circumstances it is clear that Mrs. Buford, having received her portion, was aware of and assented to the appointment made by Mrs. Stoner; and this is made plainer from the appearance of the names of H. D. C. Buford and N. W. Buford, as witnesses to Mrs. Stoner's will, who are now ²¹⁹ claiming the land in this suit as the sons of Mrs. Buford, and the heirs of Mrs. Stoner. Mrs. Buford was not a forgotten child, and hence she could not complain of this appointment made to Mrs. Thrasher as invalid if she were living. Much less can her sons, since their mother died before it became effective.

The judgment is therefore affirmed.

WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED—COMPETENCY.—A party cannot testify as a witness to a contract or conversation between himself and a deceased person when the opposite party derives his title from such decedent: *Note to First Nat. Bank v. Payne*, 33 Am. St. Rep. 526.

TRUSTS—CONVERSION BY TRUSTEE—RIGHT OF CESTUI QUE TRUST.—Trust property, however changed, continues subject to the trust: *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332. A trustee cannot convert money into land or land into money, at his pleasure, unless specially authorized; and, if he invests money in land, the cestui que trust may take the land or demand the money, at his option: *Kaufman v. Crawford*, 9 Watts & S. 131; 42 Am. Dec. 323.

ESTOPPEL.—A conveyance by an heir apparent estops him from recovering the property when it subsequently descends to him: *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642. An estoppel must be mutual: *Springer v. Shavender*, 118 N. C. 33; 54 Am. St. Rep. 708. It must bind both parties: *Commissioners v. Heaston*, 144 Ind. 583; 55 Am. St. Rep. 192; and one who is not bound by it cannot take advantage of it: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247. A judgment unreversed, estops the party against whom it has been rendered from proving any allegation inconsistent with it: *Dunlap v. Glidden*, 31 Me. 435; 52 Am. Dec. 625.

JUDGMENT—PARTIES—CONCLUSIVENESS.—A former judgment is not admissible as conclusive evidence of a material fact therein adjudicated, unless the parties are identical in the two cases: *Fuller v. Metropolitan etc. Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84; *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533; *Morrison v. Clark*, 89 Me. 103; 56 Am. St. Rep. 395.

Effect of Desertion of a Wife on her Property Rights, and her Power to Contract, et cetera.

General Rule—Exception.—It is incontrovertibly true, as a general principle, that a married woman cannot, at common law, contract so as to make herself liable, but, upon the principles of equity, she may contract so as to bind her separate estate. It is equally true, as a general proposition, that a married woman cannot be sued alone at law. From an early period in the history of the common

law, there have been, however, certain exceptions allowed to both of these general propositions, not only for the benefit of the wife, but for the benefit and protection of those with whom she might contract, as where the husband is banished or has abjured the realm, or where he is an alien residing abroad. In such cases, the wife not only has the capacity to contract, but is capable of suing and of being sued alone, as a feme sole. There is nothing, therefore, very anomalous, even at common law, in a married woman being allowed the capacity of, and treated as, a feme sole, under special circumstances. The power to contract, and the incidental right to sue and liability to be sued alone, have been allowed to a deserted wife, from the force of circumstances and the necessity of the situation in many cases, and it may be remarked here that the right of a feme covert to contract in reference to her estate, and the consequent right to sue and her liability to be sued, have been greatly extended in recent times by statute. Hence, although the general rule of law is, that a married woman cannot make a binding contract, or be the subject of a suit, yet, if there has been a desertion by the husband, in the ordinary meaning of the term, and their separation has been long continued, or is so complete that he must be regarded as having renounced all his marital rights and relations, such a case would be an exception to the rule, and she would be treated as a feme sole: *Ayer v. Warren*, 47 Me. 217. A lease by a wife of a fugitive from justice, who has fled the state, of a hotel, which is the joint property of the husband and wife, given for one year for a full consideration, is valid and binding, especially where she is destitute of means, and the rent is necessary for her support: *Cheek v. Bellows*, 17 Tex. 613; 67 Am. Dec. 686. A married woman, on being abandoned by her husband, has power to control, manage, and convey the community property: *Wright v. Hays*, 10 Tex. 130; 60 Am. Dec. 200, and note; *Fullerton v. Doyle*, 18 Tex. 4, 13; *Zimbleman v. Robb*, 53 Tex. 274, 281. She may maintain an action, in Texas, to protect the homestead, where her husband is absent from the state, or refuses to join in the suit: *Kelley v. Whitmore*, 41 Tex. 647; *Hagerty v. Hagerty*, 149 Ill. 655.

A wife who has been abandoned by her husband, who has several small children to support, and who has but little money and means of subsistence, has authority, even at common law, to sell a vicious cow left by her husband, for the purpose of procuring family supplies, where the cow is of no use in supporting the family. The purchaser's right to the cow, if sold by the wife, cannot be disputed by one of the husband's attaching creditors, although he intended that the cow should be given to such creditor to pay the former's debt; and the wife is not required to delay the sale of the cow until her stock of provisions and money is exhausted: *Rawson v. Spangler*, 62 Iowa, 59. An abandoned wife may dispose of her husband's exempt property, left in her hands, in any way she may choose, and her husband's creditors cannot complain: *Waugh v. Bridgeford*, 69 Iowa, 334. A wife, who has been deserted by her husband, may make a binding contract for medical services, they being regarded in law as "necessaries," the same as food and

clothing: *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 603. In this case, Campbell, C. J., said: "Where a husband utterly deserts his wife, it would be a cruel rule for her, if she cannot, in his absence, at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessary, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons, and when the occasion is pressing, it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them. It seems to us that no sensible line can be drawn between contracts for food and clothing and contracts for medical aid. It is not going out of the way to regard a husband who deserts his family, and does nothing for their support, as refusing to perform the contracts of his wife for necessities. Such stubborn and willful neglect is treated as equivalent to a refusal—in most cases, of dereliction of duty; and there is no reason for making an exception in such a case as this. We think the contract was binding": *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606. But a note given by a wife, whose husband has deserted her, while living apart from him, for necessities used by her in her own support, is held, in Vermont, to be void; and her promise to pay it, made after her divorce and before her remarriage, is without consideration and invalid: *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762. Compare note to this case on a deserted wife's contract for necessities.

A court of chancery will decree a suitable maintenance to a wife out of her equitable interests, in case of desertion or ill-treatment by the husband: *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 362; *Dumond v. Magee*, 4 Johns. Ch. 318. This jurisdiction is not, however, maintained upon the ground merely of a trust which the court has a right to enforce, but is a separate branch of equity, and seems originally to have been exercised only where a husband sought the aid of a court of chancery to gain possession of his wife's property: *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 362. A husband who abandons his wife, and marries another woman, with whom he continues to live for twenty years, forfeits all just claim to his former wife's distributive share of personal estate inherited by her: *Dumond v. Magee*, 4 Johns. Ch. 318. In this case, the abandoned wife had, upon report and belief of her husband's death, married another man, and the court directed the principal of her distributive share to be brought into court and placed at interest, the interest to be paid to the wife, for her support, during life, and after her death the principal to go to her children by her lawful husband, or to their representatives: *Dumond v. Magee*, 4 Johns. Ch. 318. Compare *Valentine v. Ford*, 2 Browne, 193.

A wife, whose husband is, by act of parliament, banished for life, may make a will, and in everything act as a feme sole, as if the husband were dead: *Countess of Portland v. Prodgers*, 2 Vern. 104; but it has been held in this country that a deserted wife can-

not, by will or testament, dispose of any interest to which her husband is, or will be at her death, entitled by law, in her real or personal property: *Vreeland v. Ryno*, 26 N. J. Eq. 160.

Courts will not aid a husband who has deserted his wife to recover her choses in action or real estate, unless he had, previous to the separation, reduced the property to possession; but if he takes possession of her real estate, there is no power to restrain his control over it: *Rees v. Waters*, 9 Watts, 90. Money furnished to a deserted wife for the purchase of necessaries, and so applied, may be recovered in equity from the husband: *Kenyon v. Farris*, 47 Conn. 510; 36 Am. Rep. 86. As to the effect of separation under a void decree of divorce, see *Richeson v. Simmons*, 47 Mo. 20; *Reis v. Lawrence*, 63 Cal. 129; 49 Am. Rep. 83, and extended note thereto. In an action by an abandoned wife, in her own name, the removal of her disability should be alleged and proved, because the fact of marriage raises the presumption that the disability still exists: *Palmer v. McMasters*, 6 Mont. 169.

Abjuration of the Realm—Leaving the State.—At the old common law, if a husband abjured the realm, his wife could sue and be sued as a feme sole: *Walford v. Duchess de Pienne*, 2 Esp. 554; *Robinson v. Reynolds*, 1 Aik. 174; 15 Am. Dec. 673. But, if a citizen subject deserted his wife, in the sense of going beyond the seas, leaving her without means of support, but went abroad without having abjured the realm, it was held that she could not sue as a feme sole, for there was a presumed animus revertendi: *Boggett v. Frier*, 11 East, 301. The doctrine of abjuring the realm, as it once obtained in England, by which the husband became *civilliter mortuus*, does not, however, have any place in our law; but in this country a total abandonment of the state would have the same effect upon the rights and liabilities of a wife therein who has been deserted by her husband as an abjuration of the realm at common law, which term originally implied a renunciation of one's country, upon an oath of perpetual banishment: *Mead v. Hughes*, 15 Ala. 141; 50 Am. Dec. 123. The law is the same whether a husband has been banished for his crimes, or has voluntarily abandoned his wife: *Rhea v. Rhenner*, 1 Pet. 105. To "abjure" the state implies a total abandonment of the state—a departure therefrom without an intention of returning: *Mead v. Hughes*, 15 Ala. 141; 50 Am. Dec. 123.

If a husband renounces his marital rights, and leaves the state with the intention of abandoning his wife and without any intention of returning, the authorities are clear that his deserted wife, though still a wife, may contract, and sue and be sued, as a feme sole, at least so long as her husband remains absent in another state or country; and this power includes a right to acquire property, and to control it and her person: *Rhea v. Rhenner*, 1 Pet. 105; *Arthur v. Broadnax*, 3 Ala. 557; 37 Am. Dec. 707, and extended note thereto; *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes*, 15 Ala. 141; 50 Am. Dec. 123; *Krebs v. O'Grady*, 23 Ala. 726; 58 Am. Dec. 312; *Clark v. Valentino*, 41 Ga. 143; *Love v. Moynehan*, 16 Ill. 277; 63 Am. Dec. 306; *Prescott v. Fisher*, 22 Ill. 390; *Anderson v. Jacobson*, 66 Ill. 522; *Ayer v. Warren*, 47 Me. 217; *Smith v. Silence*, 4

Iowa, 321; 66 Am. Dec. 137; Gregory v. Pierce, 4 Met. 478; Danner v. Berthold, 11 Mo. App. 351; Harris v. Bohle, 19 Mo. App. 529; Phelps v. Walther, 78 Mo. 320; 47 Am. Rep. 112; Palmer v. McMasters, 6 Mont. 169; Osborn v. Nelson, 59 Barb. 375, 381; Starrett v. Wynn, 17 Serg. & R. 130; 17 Am. Dec. 654; Spier's Appeal, 26 Pa. St. 233; Valentine v. Ford, 2 Browne, 193; Terry's Appeal, 55 Pa. St. 344; Bean v. Morgan, 4 McCord, 148, questioned and commented on in Boyce v. Owens, 1 Hill (S. C.) 8; Hall v. Faust, 9 Rich. Eq. 293, confining the creditors' right of recovery against an abandoned wife to necessaries: Cusack v. White, 2 Mill, 279; 12 Am. Dec. 669; Cocke v. Garrett, 7 Baxt. 360; Yeatman v. Bellmain, 6 Lea, 488. Contra, Chouteau v. Merry, 3 Mo. 182; Brackett v. Drew, 20 N. H. 441. Thus, a feme covert whose husband, a mariner, had been absent more than two years, leaving her no support but her labor, was considered as a feme sole trader, in Valentine v. Ford, 2 Browne, 193, and it was there held that she might receive a distributive part of her ancestor's estate. So, if a husband deserts his wife and ceases to perform his marital duties, her acquisitions of property, made during the time of such desertion, are her separate estate, and she may dispose of them by will or otherwise: Starrett v. Wynn, 17 Serg. & R. 130; 17 Am. Dec. 654. And, if he permanently renounces his marital relations, removes beyond the state and dwells there permanently, and contributes nothing toward the support of his wife, who, during his absence, acts and represents herself as a feme sole, acquires lands with her own earnings, takes a conveyance to herself in fee, and sells the property, describing herself in the conveyance as a widow, the husband and wife cannot maintain ejectment against the purchaser without first tendering him the amount of the purchase money, and all sums expended by him in good faith in erecting improvements on the land, where he relied on the wife's recital in her deed that she was a widow, had knowledge of her course of living and dealing, and believed that she was a feme sole: Danner v. Berthold, 11 Mo. App. 351. The law seems to be well settled that when a wife, left by her husband without maintenance and support, has traded as a feme sole, and has obtained credit as such, she ought to be liable for her debts: Rhea v. Rhenner, 1 Pet. 105; and she, when sued for a debt, contracted by herself, during the time of her husband's abandonment, cannot rely on the defense that he has not abandoned her, if the facts show that he has done so: Yeatman v. Bellmain, 6 Lea, 488. This case clearly shows that creditors have rights as well as an abandoned wife. If a married woman has been left by her husband to obtain her own living, she may legally claim the amount of her own labor, and marriage will not impede her in a court of equity: Spier's Appeal, 26 Pa. St. 233. In Indiana, a married woman can charge her real estate by such contracts only as are reasonably calculated to make the property profitable to her, or to preserve it, or to protect her title thereto. Hence, if she has been abandoned by her husband, who goes and resides in another state, she cannot charge her real property by her written agreement to pay a stated sum to a third person, if he will inform her as to the

whereabouts of her husband so that she can find him: *Smith v. Howe*, 31 Ind. 233.

Abandonment—State Lines.—Some authorities hold that the abandonment of a wife by her husband does not give her the rights, or impose upon her the liabilities of a feme sole, to contract, et cetera, unless he has gone beyond the state, with the intent to desert his wife, and without any intention of returning: *Musick v. Dodson*, 76 Mo. 624; 43 Am. Rep. 780; *Krebs v. O'Grady*, 23 Ala. 726; 53 Am. Dec. 312; *Gregory v. Pierce*, 4 Met. 478; *Fuller v. Bartlett*, 41 Me. 241; and it is doubtless understood to be the general rule, in cases of the kind under consideration, that there can be no abandonment of a wife sufficient to give her the rights, and to subject her to the liabilities, of a feme sole, without the husband puts himself over the state line. It is clear, however, that a husband may desert his wife and still reside within the state, and no good reason is apparent why a wife should not be regarded as a feme sole in such a case. In fact, there is good authority for the proposition that where a husband compels his wife to live separate from him, whether in or out of the state, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent, and without expectation of again living together, and she is unprovided for by her husband, in such a manner as is suited to their circumstances and condition in life, the wife may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a feme sole, during the continuance of such relation: *Love v. Moynahan*, 16 Ill. 277; 63 Am. Dec. 306; *Benadun v. Pratt*, 1 Ohio St. 403. Compare *Peru v. French*, 55 Ill. 317, 324; *Mix v. King*, 55 Ill. 434, 438; note to *Hayward v. Barker*, 36 Am. Rep. 765, 766. In Louisiana, it is only when the husband is absent from the state that a judge can authorize his wife to make contracts. Absence from a parish is not enough: *Wilkinson v. Stanbrough*, 1 La. Ann. 264. In speaking of a case of abandonment, where the husband was a resident of another state, *Skinner, J.*, in *Love v. Moynahan*, 16 Ill. 277, 63 Am. Dec. 306, said: "In case of abandonment of the wife by the husband, the reason of the rule of the common law concerning the marital relations ceases to exist, and with the reason the rule should cease, when demanded by the necessities of justice. Why should a woman, abandoned by her husband, and without means of living, not be permitted to provide for the necessities of herself and family by industry and economy, to acquire property, to control her own actions, and to protect her person and acquisitions? Illustrations of extreme hardship might be given without limit, but they are familiar to every observing person. It is true, the law provides for divorce from the bonds of matrimony in certain cases, but many women have conscientious scruples against obtaining a divorce and should not be compelled to violate conscience to acquire the mere ability of living by the fruits of their own labor. The husband is discharged from his liability to provide for the wife, if she, without cause, abandons him, and why the wife, being abandoned by the

husband, should be kept continually subject to his plunder, or to that of his creditors, must be hard to answer."

Abandonment Must be Permanent.—To enable a deserted wife to sue, and to render her liable to be sued, as a feme sole, her husband's abandonment must be an absolute and complete desertion, with an intent to renounce, de facto, the marital relation, and to leave her to act as a feme sole: *Gregory v. Pierce*, 4 Met. 478; *Kendall v. Jennison*, 119 Mass. 251; *Danner v. Berthold*, 11 Mo. App. 351; *Beckman v. Stanley*, 8 Nev. 257; *Krebs v. O'Grady*, 23 Ala. 726; 58 Am. Dec. 312; *Brackett v. Drew*, 20 N. H. 441; *Kay v. Duchesse de Pienne*, 3 Camp. 122; *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137; *Ayer v. Warren*, 47 Me. 217; *Yeatman v. Bellmain*, 6 Lea, 488. His mere temporary absence will not make her a feme sole: *Robinson v. Reynolds*, 1 Ark. 174; 15 Am. Dec. 673. If he temporarily deserts her, and is absent from the country, though for several years, and she buys a tract of land, giving back a mortgage to secure the purchase money, the mortgage is void: *Concord Bank v. Bellis*, 10 Cush. 276. A woman who has once been in the situation of a feme covert does not become a feme sole because her husband has been abroad a year: *Kay v. Duchesse de Pienne*, 3 Camp. 122. It has even been held that the wife of a person who has been absent six or seven years in the East Indies cannot be considered as a feme sole: *Commonwealth v. Cullins*, 1 Mass. 116. Compare *Chouteau v. Merry*, 3 Mo. 182.

No mere simple separation, separate maintenance of a wife, or living apart by her, will enable her to sue, or subject her to be sued alone: *Robinson v. Reynolds*, 1 Ark. 174, 15 Am. Dec. 673; *Harris v. Taylor*, 8 Sneed, 536; 67 Am. Dec. 576; *Chouteau v. Merry*, 3 Mo. 182; *High v. Worley*, 33 Ala. 196; *Parker v. Lambert*, 31 Ala. 89; *Freer v. Walker*, 1 Bail. 184; *Robards v. Price*, 3 McCord, 475; though in Louisiana, a wife separated from bed and board, may make all contracts not prohibited to her, as if she were unmarried: *Nichols v. Her Husband*, 7 La. Ann. 262; and a wife "separated in property" is liable, in that state, for her proportion of the household expenses, and for the whole thereof if her husband is without means: *Hardin v. Wolf*, 29 La. Ann. 833.

A husband's frequent protracted absence, and the practice of his wife to transact business as a feme sole, do not remove her disability to contract, unless her husband is dead in law: *Rogers v. Phillips*, 8 Ark. 366; 47 Am. Dec. 727. "Long and necessary absence from the state, in the confederate army," did not, it was held in *Carothers v. McNese*, 43 Tex. 221, and of itself, necessarily authorize a wife, during such absence, to bind the community property or her separate estate for the purchase of land. A wife, in her husband's absence, has implied authority to take care of the community property, and to make contracts respecting it for her own support, where no one else is left in charge of the property: *Cheek v. Belows*, 17 Tex. 613; 67 Am. Dec. 686; but where a husband was absent in the confederate army, leaving his wife in charge of the plantation, she was not, in *Sorrel v. Clayton*, 42 Tex. 192, deemed "abandoned" by him so as to be personally liable on her contract made

in managing the plantation. A married woman cannot, at common law, hold personal property adverse to her husband, though he has abandoned her for a continuous period of more than twenty years, but has lived in the same state during that time: *Bell v. Bell*, 37 Ala. 536; 79 Am. Dec. 73; 36 Ala. 466.

A wife, however, finally separated from her husband, has power to bind her separate estate by her contracts: *Davis v. Saladee*, 57 Tex. 326; as a separation, if permanent, is equivalent to desertion. A married woman, in Louisiana, separated in property and administering her own affairs, is answerable on her note without proof that it inured to her individual benefit: *Cormier v. De Valcourt*, 33 La. Ann. 1168; and in a suit for necessary repairs done upon a homestead at the request of a wife, during the protracted absence of her husband, it is error to instruct that such contract, to be binding on the husband, must be ratified by him: *McAfee v. Robertson*, 41 Tex. 355, 358.

It is apparent from the cases above cited that desertion is not determined by the length of time that a husband has been absent from his wife, though length of time is a circumstance in the proof of desertion. If a husband has voluntarily left his wife, with an intention to forsake her entirely, and never to return to her, he has abandoned her, and the length of time during which the separation continues before she assumes to act as a feme sole, is of no importance, except as affording evidence of her husband's intention with regard to his return: *Moore v. Stevenson*, 27 Conn. 14. It may be said that the question whether a married woman, who has been abandoned by her husband, is a sole trader or not is one of fact, to be determined by the jury from the circumstances of the case: *Anderson v. Jacobson*, 66 Ill. 522; *Burke v. Cole*, 97 Mass. 113. After a long absence, a husband, who has deserted and abandoned his wife, may be presumed to be dead, where he has not been heard of: *Cusack v. White*, 2 Mill. 279; 12 Am. Dec. 669. Thus, where a married man sailed in a vessel from New York, on a voyage to South America, and neither he nor the vessel was ever heard of afterward, this was held to be sufficient evidence of his death, on a plea of coverture, in an action brought against his wife as a feme sole, twelve years after the departure of her husband: *King v. Paddock*, 18 John. 141. But a married woman is not required, at her peril, to take notice of the death of her husband, who deserted her and was absent before and at the time of his death: *Terry's Appeal*, 55 Pa. St. 344. An absence from the state for seven years, without being heard of, raises a legal presumption of the death of a husband who has deserted his wife, but no lapse of time, when the husband is absent from the state, but known to be alive, by being seen or heard of, in less than seven years from the trial of an action, will, of itself, have the effect of allowing his wife to contract as a feme sole: *Boyce v. Owens*, 1 Hill (S. C.), 8. Evidence that the separation of a man and his wife was by mutual consent of the parties, and that he made provision for her separate maintenance, tends to prove his renunciation of marital rights and relations, but is not conclusive on that point: *Ayer v. Warren*, 47 Me. 217.

Wife of an Alien.—A wife, abandoned by her husband or driven from his home in another state or country, and coming and residing within a state, may contract, sue, and be sued, and convey her estate, in the same manner as a feme sole, in the latter state when the husband has never come into that state: Gregory v. Paul, 15 Mass. 31; Abbott v. Bayley, 6 Pick. 89; Wagg v. Gibbons, 5 Ohio St. 580; Blumenberg v. Adams, 49 Cal. 308; Robinson v. Reynolds, 1 Aik. 174; 15 Am. Dec. 673; Spier's Appeal, 26 Pa. St. 233; Rose v. Bates, 12 Mo. 30; Gallagher v. Delargy, 57 Mo. 29; In re Ruddell, 2 Low. 124; Roland v. Logan, 18 Ala. 307; McArthur v. Bloom, 2 Duer, 151. Compare Kay v. Duchesse de Pienne, 3 Camp. 123; Cornwall v. Hoyt, 7 Conn. 420, where the husband abandoned his state or country and became an alien enemy. In giving the reasons for according to a wife the powers of a feme sole, where she had come and resided within the state, after being abandoned by her alien husband in the country of his domicile, Putnam, J., in Gregory v. Paul, 15 Mass. 31, 34, says: "Miserable, indeed, would be the situation of those unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes, to obtain a precarious support."

Power of Wife to Make a Deed.—Whether a deserted wife can make a valid deed, without her husband joining with her, is a disputed question. If she has no power, under any particular statute, to convey real property, without the consent of her husband and his joinder in the deed, her deed of such property, acquired by her whilst a feme sole trader, and whilst abandoned by her husband, would be void, if made without the indispensable requisites of a separate examination and other solemnities required by law: Rhea v. Rhener, 1 Pet. 105, 109; Beckman v. Stanley, 8 Nev. 257; Harrison v. Brown, 16 Cal. 287. The fact, it is said, that a husband abandons his wife, or suffers her to act as a feme sole, and to take care of herself, does not give her a right to mortgage either his or her separate property, whatever may be the effects of such acts of the husband in rendering her personally liable for her contracts: Harrison v. Brown, 16 Cal. 287, 291. But there is authority tending to show that a husband's renunciation of his marital relations and his permanent residence in a foreign jurisdiction clothes his wife with the powers of a feme sole, and that she may then convey title to land held by her in fee, without the joinder of her husband: Danner v. Berthold, 11 Mo. App. 351. A wife, in Texas, upon her husband's abandonment, may convey realty which she has acquired during his abandonment, without a compliance with the statutory formalities prescribed as to conveyances by a wife: Wright v. Hayes, 10 Tex. 130; 60 Am. Dec. 290; Fullerton v. Doyle, 18 Tex. 4. So, in Ohio, a deserted wife's joinder with her children, in a conveyance,

will bar her, by way of equitable estoppel, from treating her contract as a nullity, and from asserting her right to have dower assigned, upon the death of her husband: *Rosenthal v. Mayhugh*, 33 Ohio St. 155; and we doubt not that a woman living apart from her husband and claiming to be divorced, or never to have been married, may be estopped from avoiding her deed on the ground of her coverture: *Reis v. Lawrence*, 63 Cal. 129; 49 Am. Rep. 83.

Insanity of Husband.—The insanity and confinement of a husband in an asylum and his failure, for years, on this account, to support his wife gives her a right to sue in her own name and to make contracts relative to her real estate, or the community property: *Harris v. Bohle*, 19 Mo. App. 529; *Gustin v. Carpenter*, 51 Vt. 585. But compare *Shaw v. Thompson*, 16 Pick. 198, 26 Am. Dec. 655, holding that she cannot be sued for necessities supplied. Under the Indiana statute, a married woman whose husband is insane, but whose insanity has not been judicially declared, can make a valid contract concerning her separate real property: *Shin v. Bosart*, 72 Ind. 105; and in Texas she has a legal right during the insanity of her husband, to dispose of so much of the community property as may be necessary for the support of herself and their children. If there is no community property, she has a right, to the same extent, to dispose of her husband's property: *Forbes v. Moore*, 32 Tex. 196.

Statutes.—It is sometimes provided by statute that a married woman, who has been abandoned by her husband, may transact business and sue and be sued as a feme sole: *Moore v. Stevenson*, 27 Conn. 14; *Ex parte Cole*, 28 Ala. 50; *Brackett v. Drew*, 20 N. H. 441; *Yeatman v. Bellmain*, 6 Lea, 488; *Rawson v. Spangler*, 62 Iowa, 59; *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137. If the husband has abandoned and left his wife unprovided for, she may, under the North Carolina statute, sue him for support, without asking for a divorce: *Cram v. Cram*, 116 N. C. 288. Under the statute of Kentucky, the abandonment of a wife by her husband does not, ipso facto, remove her disability to sue. The statute of that state authorizes the wife, in such cases, to sue and be sued only after being empowered to do so by the judgment of a court of equity: *McDanell v. Landrum*, 87 Ky. 404; 12 Am. St. Rep. 500. An abandoned wife, who has applied for and received pauper supplies, is answerable for them, and her coverture is no bar to an action therefor, under the statute of Maine: *Peru v. Poland*, 78 Me. 215. The remedy provided by statute in relation to married women abandoned by their husbands is cumulative, and is more particularly applicable to cases where the abandonment is not such as to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a feme sole: *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137. The Tennessee statute annuls and destroys the marital rights of the husband over the acquisitions of his wife during the separation contemplated by such law as completely, during the continuance of such separation, as would have been the case had the vinculum of the marriage been legally severed before such acquisitions were made: *Cooper v. Mad-dox*, 2 Sneed, 135. In such a case, the wife occupies with reference to her property, precisely the same situation as a feme sole:

Cocke v. Garrett, 7 Baxt. 360. If the wife dies intestate during such separation, and no reunion, as contemplated in the act, intervenes, between such separation and her death, the husband acquires no right of succession to the acquisitions of his wife, but they go to the next of kin as distributees of the wife: Cooper v. Maddox, 2 Sneed, 135. If a husband is dissipated, lives apart from his wife, contributes nothing to her support, and she is engaged in business on her own account, this is such an abandonment, under the Tennessee statute, as enables her to sue and be sued in her own name: Yeatman v. Bellmain, 6 Lea, 488. After a husband has voluntarily abandoned his wife, and conveyed his interest in the homestead to her, he cannot, under the Illinois statute, re-enter and enjoy the homestead rights and interest therein, where no abandonment of the homestead by the wife is shown: Hagerty v. Hagerty, 149 Ill. 655. Under the statute of Rhode Island, a married woman cannot convey realty as a feme sole, if she has ever lived with her husband in that state: Mason v. Jordan, 13 R. I. 193. As to when a wife may be regarded as a feme sole at common law, see monographic note to Arthur v. Broadnax, 37 Am. Dec. 709-714.

STATE v. GOETZE.

[48 WEST VIRGINIA, 495.]

INTERSTATE COMMERCE—ORIGINAL PACKAGE—FEDERAL QUESTION.—What constitutes an original package, in interstate commerce law, is a federal question.

INTERSTATE COMMERCE—CIGARETTES—WHAT IS AN ORIGINAL PACKAGE.—If cigarettes are put up in paper boxes, at a factory, in another state, for the manufacturer of cigarettes, each box containing ten cigarettes, and are shipped, for sale, to this state, in a large wooden box, which, for convenience of shipment, contains a number of the smaller paper boxes each paper box must be regarded as an original package, where it has a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were manufactured, the name of the manufacturer, and the internal revenue stamp for the cigarettes, duly canceled, pasted across the end of each package, so as to seal the same, in accordance with the requirements of the act of Congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes.

INTERSTATE COMMERCE—POLICE POWER OF STATE—CONTROL OF CONGRESS.—That which does not belong to commerce may be regulated by the state, under its police power, but that which does belong to commerce falls within the exclusive control of the United States.

INTERSTATE COMMERCE—CIGARETTES—RIGHT TO SELL IN ORIGINAL PACKAGE.—Cigarettes manufactured in another state and imported into this state, may be lawfully sold in the original package.

INTERSTATE COMMERCE—CIGARETTES—LICENSING SALE OF—STATE REGULATION—VOID STATUTE.—A state statute imposing a license fee upon those selling cigarettes at retail is void so far as it applies to cigarettes imported from another

state and sold here in the original packages without their being broken. Such an application of the statute is not an exercise of the police power of the state, but an attempt to regulate interstate commerce, with respect to the sale of cigarettes, which the state has no power to do.

John A. Howard and T. S. Riley, attorney general, for the state.

S. G. Smith and W. W. Fuller, for the defendant in error.

⁴⁹⁶ ENGLISH, P. On the 3d of September, 1895, Charles Goetze was indicted in the criminal court of Ohio county for selling without a license paper-wrapper cigarettes, in violation of chapter 11 of the acts of 1895. On the eighteenth day of November, 1895, the defendant was tried upon said indictment, convicted, and judgment entered against him for the payment of a fine of ten dollars and costs of prosecution. The defendant obtained a writ of error to the circuit court of Ohio county, and on the 23d of June, 1896, the circuit court reversed the judgment of said criminal court, and held that the act of the legislature referred to was unconstitutional, and dismissed the prosecution against the defendant. It appears from the record that the defendant admits the sale as charged in the indictment, but contends that he had a right to make such sale, for the reason that the act referred to interfered with interstate commerce, and was therefore unconstitutional. From the judgment of the circuit court the state of West Virginia applied for and obtained this writ of error, assigning the following errors: 1. That the circuit court erred in holding that the act of the legislature referred to is unconstitutional, and by reason thereof the defendant was not guilty as charged and convicted in the criminal court; 2. That the circuit court erred in setting aside, reversing, and annulling the judgment of the criminal court, and dismissing the prosecution—contending that, if the criminal court had erred in its judgment, all the circuit court could do would be to reverse the judgment of the court below and send the case back for a new trial.

The facts of this case, as appears from the record and the agreement of counsel, are that the defendant, Charles Goetze, was, on August 31, 1895, doing business as a druggist in the city of Wheeling, Ohio county, West Virginia, and that he purchased from the American Tobacco Company (a corporation organized under the laws of the state of New Jersey, having a factory for the manufacture of cigarettes in the state of New York and in other states, but having none in the state of West Virginia) a

consignment of cigarettes, which were packed in a large wooden box, which box contained a number of smaller paper boxes, each of which paper boxes contained ten cigarettes, which ⁴⁹⁷ cigarettes were known as "Sweet Caporal" and "Virginia Brights," the names being indorsed on the packages, and the proper revenue stamp affixed thereto; that the packages of cigarettes were not unpacked from the wooden case, except as they were handed out to purchasers in the paper packages of ten above described; that on the thirty-first day of August, 1895, the defendant sold to one William Bell two of said paper packages, at his drugstore aforesaid, taking the same, at the time of sale, from said large box.

It is disclosed by the testimony and admissions of counsel that the defendant purchased the cigarettes in question from the American Tobacco Company, a New Jersey corporation doing business in New York, and that said cigarettes were packed in boxes, each containing ten, which boxes were properly indorsed and stamped as required by law, and that said paper boxes, for convenience of shipment, were packed in a wooden box, and shipped therein directly from the American Tobacco Company in New York, to the defendant, in the city of Wheeling, and after the wooden box was opened said cigarettes were sold in the paper boxes as they came from the factory, each containing ten, and not one cigarette at a time, as other cigars are sold by retail. In other words, they were sold by the box, and not by the cigarette. Were they sold by the original package, or should the defendant have sold the entire contents of the wooden box, without opening the same, in order to constitute the sale by the original package? We cannot say the wooden box constituted the original package, any more than we would say, if these paper boxes had been wrapped in thick paper and tied with twine, or packed in a barrel, for convenience in shipping, that the paper parcel or the barrel should be considered the original package. As the cigarettes came from the hands of the manufacturer, they were in paper boxes, each containing ten, for the convenience of their customers; and, whether they sold one box or a thousand, these paper boxes must be regarded as original packages. These packages, as before stated, had upon them the label giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were ⁴⁹⁸ manufactured, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each package, so as

to seal the same, in accordance with the requirements of the act of Congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, all of which is required by law to constitute a package of cigarettes ready for shipment and sale; and, when these things are done, the package may be regarded as an original package. None of this indorsement or stamping is required to be placed upon the pine box or barrel or paper parcels in which these packages might be shipped, and opening the box, barrel, or parcel for the purpose of taking out the paper boxes cannot be considered as breaking the original package. These packages are, moreover, required to be put up in this particular manner by the act of Congress, and a penalty is prescribed for a failure so to do. The Revised Statutes, section 3392, contains the following provision, to wit: "That every manufacturer of cigarettes shall put up all the cigarettes that he either manufactures or has made for him, and sells or removes for consumption or use, in packages or parcels, containing ten, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use under such regulations as the commissioner of internal revenue shall prescribe." And section 3381 of said Revised Statutes, on the same subject, provides that "he shall neither sell nor offer for sale any tobacco, snuff, or cigars, except in original or full packages, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff, and cigars as bear the manufacturer's label or caution notice and his legal marks and brands and genuine internal revenue stamps which had never been used."

This must be regarded as a federal question, and, in consequence, we must look to the federal decisions for precedents which shall control our conclusion. The identical question presented in this case was passed upon in the United States circuit court for the district of West Virginia in *In re Miner*, 69 Fed. Rep. 233, and it was ⁴⁹⁹ there held that "the act of West Virginia (February 21, 1895) amending and re-enacting the code, chapter 32, section 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes imported from another state and sold by the importer in West Virginia in the original package, and to cigarettes manufactured in another state, and by the manufacturer sent into

West Virginia in the original package for sale by the agent of the manufacturer, and so sold in such package by such agent, is not an exercise of the police power of the state, but a regulation of interstate commerce, and therefore void." Goff, J., in his opinion in that case, on page 235, says: "The rule now well established is clearly stated by Mr. Justice Field in *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, 507, in these words: 'Where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operations, such as harbor pilotage, the improvement of harbors, the establishments of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, erection of walls, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon and provide the needed regulations.' It follows that if Congress has not legislated on any special subject relating to commerce, and the enactments of a state regarding the same are questioned, the only matter to be determined by the courts is, Does the state legislation complained of amount to a regulation of commerce? If so, it is unconstitutional and void." Judge Goff, in his opinion, also says: "The argument submitted by counsel for the state, that the legislation by virtue of which the petitioner was arrested is but the proper exercise by the state of its police power, is, I think, without merit. That which does not belong to commerce may be regulated by the state, under its police power, but that which does belong to commerce falls within ⁵⁰⁰ the exclusive control of the United States. This act of the West Virginia legislature inhibits the sale by the petitioner (unless he first pays a tax for the privilege so to do) of the original packages of cigarettes imported by him into the state of West Virginia from the state of New York while they are still articles of commerce, and this demonstrates by the authorities I have referred to that it is not a proper use of the police power."

In the case of *Leisy v. Hardin*, 135 U. S. 100, which was taken to the supreme court of the United States from the state of Iowa, the syllabus reads as follows: "A statute of a state prohibiting the sale of any intoxicating liquors except for pharmaceu-

tical purposes, medicinal, chemical, or sacramental purposes, and under a license from a county court of a state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the constitution granting to Congress the power to regulate commerce with foreign nations and among the several states." In that case the marshal of the city of Keokuk, under the statute of the state, had seized a number of barrels of beer, and eleven sealed cases of beer, which had been manufactured by Leisy & Co. in the state of Illinois, each of which kegs or barrels had placed upon it over the plug in the opening of each keg a United States internal revenue stamp of the district in which Peoria is situated. Said cases were substantially made of wood, each one of them containing twenty-four quart bottles of beer, each bottle of beer corked, and the cork fastened in with a metallic cap sealed and covered with tin foil and each case was sealed with a metallic seal. That said beer in all of the said kegs and cases was manufactured and put up into said kegs and cases by the manufacturers, Leisy & Co., and to open said cases the metallic seals had to be broken. That the property above described was transported by Leisy & Co. from Peoria, Illinois, by rail, to Keokuk, Iowa, in said sealed kegs and cases, and was offered for sale by John Leisy, a resident of Keokuk, Iowa, who was agent for Leisy & Co., in the original keg and sealed case, as manufactured and put up by Leisy & Co., and transported by ⁵⁰¹ them into the state of Iowa. An action of replevin was brought against said marshal to recover said property, which was decided in the state court in favor of the plaintiff, which decision was affirmed by the supreme court of Iowa, and was then taken to the supreme court of the United States, where the opinion of the court was delivered by Justice Matthews, who, after going into an exhaustive review of the subject, and citing numerous authorities in support of his position, concluded as follows: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages as described. Under our decision in *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 507, they had the right to import this beer into that state; and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the

state had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character, although at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress, and its possession by the latter was considered essential to that more perfect union which the constitution was adopted to create." This question has frequently been before the courts of the different states and the supreme ⁵⁰² court of the United States, and other cases might be cited in full accord with the decisions we have quoted, but it is regarded as unnecessary for the determination of the case we are now considering. Having arrived at the conclusion that the packages of cigarettes sold by the defendant in this case were original packages, and the evidence showing that they were sold as they came from the manufacturer, without being broken, my conclusion is that the act of February 21, 1895, was not an exercise of the police power of the state, so far as it applies to the facts shown by the testimony in this cause, but a regulation of interstate commerce, and therefore void; and the criminal court erred in overruling the defendant's demurrer to the evidence, and entering judgment against him.

The judgment of the circuit court is therefore affirmed.

INTERSTATE COMMERCE—POLICE POWER—STATUTES.—

The view taken in the principal case as to what constitutes an "original package" is contrary to that entertained in other cases: See *Haley v. State*, 42 Neb. 556; 47 Am. St. Rep. 718, and note; *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32, and note. But compare the discussion of "original packages" in the extended note to *People v. Wemple*, 27 Am. St. Rep. 553. From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation and not to the police

power of the state: *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774. Thus, imported goods are not subject to taxation under state laws until the packages are broken or they have been sold by the importer: *Note to Buck v. Miller*, 62 Am. St. Rep. 473; and the state cannot make the taking out of a license a condition precedent to the carrying on of interstate or foreign commerce: *Osborn v. State*, 33 Fla. 162; 39 Am. St. Rep. 99. Every tax on interstate commerce is a burden thereon, and, if imposed by the legislature of a state, is illegal: *McNaughton Co. v. McGirl* 20 Mont. 124; 63 Am. St. Rep. 610. For a thorough discussion of the constitutionality of state regulations of interstate commerce, see monographic note to *People v. Wemple* 27 Am. St. Rep. 547-568.

PRICE v. MOUNDSVILLE.

[43 WEST VIRGINIA, 523.]

STATUTES—CONSTITUTIONALITY—DUTY OF COURT TO PASS UPON.—Under a constitution which imposes on the judiciary the duty of deciding the constitutionality of a law, without limitation, a court must inquire into that question whenever it is properly presented for its consideration.

STATUTES—SUFFICIENCY OF TITLE, THOUGH CHANGED.—If the original title of a bill is sufficient, the legislature does not vitiate the legislation by rendering the title more specific during the progress of enactment, when the object of the bill is not thereby essentially changed.

STATUTES—VALIDITY—CLERICAL DEFECTS.—A law is not vitiated by a defect in a legislative journal which is shown, on the face thereof, to be clerical in its nature.

STATUTES—VALIDITY—CLERICAL ERROR—SECOND READING.—To make a law unconstitutional on the ground that the legislature did not comply with the constitutional requirement as to reading a bill a second time, it must affirmatively appear from the legislative journal that this was not done. If it is apparent, from the journal, that there was a second reading, though not expressed in words, the act is not vitiated.

Bill by B. W. Price and A. Tomlinson against the city of Moundsville, and others. There was a decree for the defendants and the plaintiffs appealed.

J. B. McClure, for the appellants.

Ewing, Melvin & Ewing, for the appellees.

524 DENT, J. B. W. Price and A. Tomlinson, citizens and taxpayers of the county of Marshall, appeal from the order of the circuit court of said county dissolving an injunction awarded them against the city of Moundsville and its officers. The question involved is the constitutionality of the act of the legislature amendatory to the charter of said city, passed on the ninth day of January, 1895. The objections to the enactment are: 1. That the title thereof, as passed by the two branches of the

legislature, was so materially variant as to make a different enactment by each house, and render the same invalid; 2. That the journal of the house does not affirmatively show the bill to have been read three times; 3. That the boundaries of the city, as set forth, are not certain and definite.

At the very threshold of the case comes up this inquiry as to whether this court is bound by the enrollment of the bill, as an absolute verity, and therefore precluded from making inquiry as to whether constitutional requirements have been fulfilled in its enactment. The common law, or English rule, which has been followed by the supreme court of the United States, as to congressional enactments, and many state courts, is that the enrollment, ratification, and approval of an act of the law-making branch of the government render the same conclusive and unimpeachable, and forever preclude the judiciary from inquiring into the procedure in relation thereto prior to its enactment. In England there is no written constitution controlling the legislative branch of the government, and the acts of parliament, being regarded in their nature as judicial—as emanating from the highest tribunal in the land—are placed on the same footing and regarded with the same veneration as the judgment of the courts, which cannot be collaterally attacked. With regard to the enactments of Congress, there is no provision in the constitution of the United States authorizing the courts to inquire into their constitutionality, either as to the procedure in enactment, or as to whether the subject matter of the act conforms to ⁵²⁵ the constitution. By usurpation, in the first place, as is sometimes claimed, the supreme court of the United States invested itself with authority to determine whether an act of Congress contravened the express provisions of the constitution; but when it came to the question as to whether the court should further usurp the right to go behind the solemn authentication of an act, and determine whether, in the enacting procedure, constitutional requirements had been adhered to, the court stopped short, and held that the respect due to coequal and independent divisions of the government requires the judicial department to rely on the solemn assurance of the legislative and executive departments that in the passage of the act the required constitutional procedure had been fully complied with in all respects: *Field v. Clark*, 143 U. S. 649. The constitution of this state is not a grant to, but an express limitation of the powers of, the legislature; and while it divides the government into three co-ordinate departments (the legislative, executive,

and judicial), and provides that they shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others (Const., art. 5, sec. 1), it imposes on the judiciary the duty of deciding the constitutionality of a law, without limitation; thus not only authorizing inquiry as to whether the act itself is within constitutional limitations, but also as to whether the same has been enacted in conformity with the express mandates of the constitution. There is no such comity between the separate departments of the state government as would require submission to the alleged acts of each other in violation or defiance of the express requirements of the constitution. No unconstitutional enactment in this state can interfere with the rights of private citizens unless it is sanctioned by all three of the departments of the state government. The constitution, as the expression of the will of the people, is the supreme law, and it is the duty of each department of the state government created by it to see that it is preserved inviolate. Their comity is first due to it, and then to each other. If one or more of the departments of the government can wholly disregard and nullify the wholesome provisions of the constitution, and then impregably fortify themselves behind their own ⁵²⁶ solemn authentication, this "solemn authentication" becomes a substitute for the constitution, and the mere will of the legislative or executive department, or both, becomes the will of the people, and the constitution is as though it never had been. Being brought into disrespect in one feature, the whole thereof is liable to the same disregard and irreverence. It is not a case of jealousy between the separate departments, but each one, in all its acts, should be ever ready to challenge the most careful scrutiny and investigation into its strict allegiance and loyalty to the spirit and letter of the instrument which gives it existence and clothes it with power. A different rule prevails in other states, dependent upon the provisions of the various constitutions as construed by their courts of last resort: See Carr v. Coke, 116 N. C. 226, when the question is fully discussed, with an elaborate note, in 47 Am. St. Rep. 801, 814. To the converse, see Spangler v. Jacoby, 14 Ill. 297; also, 58 Am. Dec. 571, and elaborate note. The rule established in these latter authorities is that "a bill duly enrolled, authenticated, and approved is presumed to have been passed by the legislature in conformity with the requirements of the constitution, unless the contrary is made to affirmatively appear; and the proof furnished by the journals of the two houses in matters of procedure must be clear and

conclusive, to overcome this presumption." The journals must affirmatively show the omission by the legislature of some essential constitutional requirement, to overcome the presumption of validity. Heretofore this court has followed this rule: *Osborn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

1. In reference to the question of title: On examination of the journals of both houses, it appears that the act in controversy was introduced into the house under the title of "House Bill No. 15.—A bill to amend and re-enact chapter 4 of the acts of 1889." And under this number and title it was carried through the house. When sent to the senate, the title was changed so as to read: "An act to amend and re-enact sections 2, 3, 5, 8, 9, 11, 13, 17, 20, 27, 29, 31, 32, 35, and 42 of chapter 4 of the acts of the legislature of West Virginia, passed on the thirteenth day of February, 1889, to amend the charter of the city of Moundsville, and to extend its corporate limits"—under which ⁵²⁷ latter title it was carried through the senate, signed by its president and the speaker of the house, approved by the governor and duly enrolled. Section 30, article 6, of the constitution provides that "no act shall embrace more than one object, and that shall be expressed in the title," thus requiring every act to have a title expressive of the object of the bill. Section 41 provides that each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein as well by their title as by their number. The only essential requirements as to the title is, that it shall express the object of the bill, and there is no provision of the constitution which inhibits the legislature, during the progress of legislation, from changing the language of the title of a bill so as to render it more definite and specific without altering the object thereof. In this case, the original title comprehended everything that was included in the amended title. Had it not done so, there would have been some reasonable grounds of complaint. The change was unnecessary, yet it afforded those interested a larger information of the proposed changes in the law. Hence, it was in no sense misleading, and therefore could not invalidate the enactment. If the original title is sufficient, the legislature does not vitiate the legislation by rendering such title more specific during the progress of enactment, if the object of the bill is not thereby essentially changed.

2. In relation to the failure to read the bill a second time: When it came up in the house in regular order for its second

reading, a motion was made to dispense therewith, which was lost. Several amendments were offered, and one adopted, and it was then passed on its third reading. The journal does not say that the bill was read a second time, but it is plainly apparent from what it does contain that this is a mere clerical omission, which, in a court of record, would be amendable on motion. The legislature having expired, its journal is beyond the power of amendment, as there is no one legally authorized to make such amendment. The courts, therefore, will supply all clerical mistakes in such records, to prevent the failure of a solemn legislative enactment by mere clerical misprision. The legislature having fully complied with the constitution, ⁵²⁸ its acts will not be vitiated by a defect in the journal which is shown on the face thereof to be clerical in its nature; for in such case it does not affirmatively appear that the legislature did not conform to the requirements of the constitution, but the reverse is apparent, though not expressed in so many words. If a journal does not furnish the means of amendment, on its face, as to any essential matter that may be omitted, then the act would be vitiated. Such is not this case, for the second reading is apparent from the journal, though not expressed in words: *State v. Francis*, 26 Kan. 732.

3. In relation to the boundaries: The last complaint is that the act does not make the boundaries certain and definite. In what respect plaintiffs are injured by this fact is not made plain in the bill, and, if not injured, they have no right of complaint. The boundary, however, seems to be precise and certain. Natural objects, such as the Ohio river, Grove creek, the penitentiary sewer, and various others, any one of which would give a surveyor a permanent starting point to locate all the lines mentioned, even if the corners were not marked and located on the ground, which is presumably the case. The injunction in this case was awarded for the purpose of giving the plaintiffs an opportunity to be heard in this court on the novel questions presented by them. When the application was first made to the circuit judge for an injunction, instead of passing on the matter as presented by the plaintiff's bill, he permitted the defendants to also present their answer, and then proceeded to adjudicate the matter as though it were a motion to dissolve, rather than an original application, and refused to award the injunction, thereby depriving the plaintiffs of the right to appeal and have their case heard and determined in this court; and so the injunction was granted by one of the judges of this court, as a

matter of necessity, to secure plaintiffs the right of appeal. Therefore, the circuit court committed no error in immediately dissolving the same, as the object thereof was secured. The error, if any was committed, was by the judge, in allowing the defendants to appear and present answers and make defense before an injunction had been awarded. There is no provision in the law for any such procedure. It is true that a court or judge may require ⁵²⁹ reasonable notice to be given of the plaintiff's application, but he is only to be satisfied with the plaintiff's equity by affidavit or otherwise before he acts thereon; and it is not expected that he shall have the issues made up on a pure bill for injunction on application, and thereby deprive the applicant of all power of appeal from a decision on the merits. In other words, on the original application he must view the case from the standpoint of plaintiff's papers, and, if from these he is satisfied of the equity, he grants the injunction, and requires a sufficient bond to cover the defendant's damages, provided the injunction should afterward appear to have been illegally awarded. When a circuit court or judge finally hears and determines a case on its merits, he should enter an appealable order, and not one that requires a party to begin anew by application for original process to a judge of this court. In this case, however, a motion to dissolve would have raised all the questions involved, as they must be trial by the act itself and the journal of the two houses, and the court would judicially take notice of both, as essentially dependent, and an answer was unnecessary.

Order dissolving injunction affirmed.

STATUTES — CONSTITUTIONALITY — ENACTMENT — JOURNALS.—It is the duty of a court to pass upon the constitutionality of an act when the question is properly presented: *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Rlson v. Farr*, 24 Ark. 161; 87 Am. Dec. 52. It need not appear affirmatively from the journals of the two houses of the legislature that every act required to be done in the enactment of the law has been done: See note to *Barber et. Paving Co. v. Hunt*, 18 Am. St. Rep. 533, and monographic note to *Carr v. Coke*, 47 Am. St. Rep. 814-823, on proof of the enactment of statutes.

CLAY v. ST. ALBANS.

[48 WEST VIRGINIA, 589.]

PLEADING OF TITLE—WHAT IS SUFFICIENT.—In an action for an injury to a present estate in real or personal property, the declaration must show title, but an allegation of possession by the plaintiff is a sufficient pleading of title.

PLEADING—AVERMENT OF SEISIN AND POSSESSION.—An allegation of seisin and possession of a lot of land, though it does not say of what estate the plaintiff is seised and possessed, imports some immediate, present estate, not a future one, and is a sufficient allegation of possession in an action of trespass on the case.

PLEADING—TRESPASS OR CASE.—Possession alone is sufficient to maintain trespass or case against a wrongdoer.

HUSBAND AND WIFE—SUIT FOR INJURY TO HER SEPARATE PROPERTY—PARTIES PLAINTIFF.—A husband and his wife may join in any action at law, or suit in equity, for an injury to her separate estate, or she may sue alone.

HUSBAND AND WIFE—SUIT FOR INJURY TO WIFE'S EQUITABLE ESTATE—PARTIES PLAINTIFF—VARIANCE.—A husband and his wife may sue together, in trespass, for an injury caused by the flow of surface water upon a lot occupied by them, although she has only an equitable title to the lot, under a trust deed which gives her simply a right to the possession, use, and benefit of the land. Hence, there is no available variance where the declaration avers a freehold estate in her, while the evidence shows that she has an estate only in equity.

MUNICIPAL CORPORATIONS—SURFACE WATER—DUTY AND LIABILITY.—A municipal corporation has no right, by any means whatever, to collect surface water and cast it in a body upon the land of a lotowner, and is answerable in damages if it does so.

MUNICIPAL CORPORATIONS—DRAINS AND GUTTERS—SURFACE WATER—INJURY—LIABILITY.—A city or town must keep its drains and gutters open and clear of obstructions, so that water in them will flow off, and is answerable in damages for its negligence in allowing them to become choked and clogged up, where injury is thereby caused to a lotowner from an overflow of surface water, except when it is due to an unusual storm or flood.

INSTRUCTIONS.—AN INDEFINITE INSTRUCTION must not be given.

Warth & Briggs, and Brown, Jackson & Knight, for the plaintiff in error.

S. C. Burdett and E. W. Wilson, for the defendant in error.

540 **BRANNON, J.** This was an action of trespass on the case by M. C. Clay and Amanda Clay, his wife, against the city of St. Albans, to recover damages for injury caused by the flow of surface water upon a lot occupied by them, resulting in judgment against the city, which sued out this writ of error.

The declaration is attacked on demurrer because it fails to plead the title of the plaintiffs—not showing whether they claim in fee, or for life or years, in present or future estate. It is plain that a declaration must have legal certainty in all material elements. It must tell wherein and how the plaintiff has been injured; if in property, it must tell what property right has been invaded. This is but the common, basic rule of the law of pleading applicable to declarations and other pleadings, "that the pleadings must show title"—not title in the common-speech

meaning (that is, deeds or ⁵⁴¹ other muniments of title), but their results, the right flowing from them, the right, estate, or property interest wherein the party has been harmed. "When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must, of course, be alleged in the party, or in some other person from whom he derives his authority. So, if a party be charged with any liability in respect to property, his title to that property must be alleged": Stephen's Pleading, 286; 4 Minor's Institutes, 1182. But how is the title to be pleaded? This is a practical question, often of perplexity. Counsel claim that this declaration should say whether the estate is in fee, for life, for years, in remainder or reversion, as the case may be; but I do not think so, for it is well settled that, where there is an injury to a present estate in real or personal property, an allegation of possession by the plaintiff is a sufficient pleading of title; and it will do to allege that personal property was "the goods and chattels of the plaintiff," or that he was "lawfully possessed of certain goods and chattels, that is to say" (specifying them); and in case of realty it will answer to say that the land was "the close of the plaintiff," or that "he was lawfully possessed of a certain close" or "a certain tract of land" (specifying it): Stephen's Pleading, 286; *McDodrill v. Pardee etc. Lumber Co.*, 40 W. Va. 564. Standard forms show this. Under such statement of title any kind of right or estate in possession, fee simple, for life, or for years, may be shown, but not a future estate, in other words, that mode of statement imports an immediate estate or property. This must be so, because one in possession has some kind of immediate estate in present enjoyment, and possession is an element of title, and prima facie evidence of good title to some kind of estate, and possession alone will support trespass. If the estate injured is a remainder or reversion, though vested, yet not vested in actual possession, you must allege such estate in proper manner. In some cases it is necessary to set out the derivation of title and the estate, as in certain pleas; but generally not in declarations, and not in those for injury to property. Now, test this declaration by these principles. It avers that Amanda Clay was "seised, and, together with the plaintiff M. C. Clay, her husband, has been during all that time, and ⁵⁴² still is, possessed, of a lot of land." Here is an averment of possession, and, though it does not say of what estate they were seised and possessed, yet it imports some immediate, present estate, not a future one, and is good, under the doctrine

above given. Possession alone is sufficient to maintain trespass or case against a wrongdoer: *Stephen's Pleading*, 287; *Wilson v. Phoenix etc. Mfg. Co.*, 40 W. Va. 413; 52 Am. St. Rep. 890.

As to the point that the declaration does not aver that the town collected surface water and cast it on the lot: It does sufficiently do so. It is clear that the town has a right to get rid of surface water, but it must not collect it in bodies, and cast it on property, changing its former flow. This declaration says that "by means of negligence and improper construction of ditches, et cetera, great bodies of surface water, changed in course, were turned and cast upon" the lot.

Counsel next say that there is a variance between declaration and proof. The declaration goes for permanent damages to the freehold, and alleges a freehold estate in the wife, whereas the evidence shows a deed to a trustee to hold upon trust to permit Mrs. Clay to hold, use, and occupy the lot for her own separate use, free from claims or debts of her husband, and to convey it as she might by will or writing direct, and, on failure to do so direct, then to convey to her heirs. The trustee holds the legal title; the wife, the full use and benefit. The deed antedates the code of 1868, which contained our first separate estate act; but, under principles of courts of equity without the help of that statute, it is her separate estate under such a deed: *West v. West*, 3 Rand. 373; *Lewis v. Adams*, 6 Leigh, 320; Code 1868, c. 66, sec. 1. At first blush, it would seem to be a variance, but is it so for the purposes of this suit? This depends on the question whether the plaintiffs can maintain this action; for, if so, there is no available variance. They could surely recover for disturbance of possession, mere possession being sufficient to support trespass. And, even in states where the husband and wife cannot join in an action for injury to her separate estate, they may, on their common possession, recover for injury to that possession, though not for injury to the very property itself—the corpus or inheritance: *Indianapolis etc. Ry. Co. v. McLaughlin*, 77 Ill. 275; *Illinois Cent. R. R. Co. v. Grabill*, 46 Ill. 445; *Noyes v. Hemphill*, 58 N. H. 537; *Lyon v. Green Bay etc. Ry. Co.*, 42 Wis. 548. But can they recover damages to the body of the estate? It is contended they cannot join in an action for injury to her separate estate. As he has no interest in her separate property, and the action must generally be in the name of the person holding title, one would think it would be misjoinder for both to sue. Many eminent authorities so hold, but many hold that they can unite in suits on contracts with

her, or concerning in any wise her separate estate. In this state they may sue together, or she may sue alone: *McKenzie v. Ohio River R. R. Co.*, 27 W. Va. 306; *Fox v. Insurance Co.*, 31 W. Va. 374. But there is the legal title in the trustee, not in her. She has only an equitable title, and, under general principles, it is a stranger to a court of law, that court knowing only the legal title. Realty conveyed to a wife under our statute gives her legal title, but this case is a deed of trust prior to that act, and the wife has an estate only in equity. Chapter 66 of the code provides that a trustee holding land in trust for a married woman may convey it to her on order of a court; showing that that legislation, in such a case as this, looks upon the trustee as holding legal title notwithstanding that chapter. 1 Perry on Trusts, section 328, says: "As the legal title is in him [the trustee], he alone can sue and be sued in a court of law, and the cestui que trust, the absolute owner of the estate in equity, is regarded in law as a stranger. . . . A trustee may also maintain an action for any trespass upon the land; but, if the cestui que trust is in the actual possession, he may maintain an action for an injury to the possession." "Suit must be in the name of the party vested with legal title, though the equitable interest be in another": *Sutherland on Damages*, sec. 130. Many authorities to same effect: *Hill on Trustees*, 274, 316; *Bakersfield Cong. Soc. v. Baker*, 40 Am. Dec. 668; *McRaeny v. Johnson*, 2 Fla. 520; note to *Doggett v. Hart*, 58 Am. Dec. 472; *Poage v. Bell*, 8 Leigh, 604; *Taylor v. King*, 6 Munf. 358; 8 Am. Dec. 746; *Dacey on Parties*, 333, 340. But in *McKenzie v. Ohio River R. R. Co.*, 27 W. Va. 306, trespass by a married woman was sustained upon an equitable title—a deed to her from her husband, void at law, vesting her with an estate in equity only. Judge Snyder said—what is exactly true in this ⁵⁴⁴ case, upon the deed involved—that the wife was the absolute owner in fee of the entire beneficial estate; the husband, a mere trustee holding legal title without beneficial interest; that if she had the legal estate she would be entitled to recover; that she would be entitled to the damages recovered; that the wife being, by reason of possession, entitled to maintain the action, and, by reason of her equitable ownership, entitled to the damages, and as no other action could be brought by the husband, but he would be barred by this, she could recover. This would make the judgment in favor of the wife beneficiary *res judicata* against the trustee in a court of law. Certainly it would in equity, as it would not allow a second action. Hence we hold that these

plaintiffs may maintain this action, and there is no variance, upon the face of said former decision. If this be open to technical objection, it attains justice on this point, though it seems to go further than the general rule.

I think there is no tenable objection to the evidence of McComas giving his opinion as to damage: *Jordan v. Benwood*, 42 W. Va. 312; 57 Am. St. Rep. 859.

Plaintiffs' instructions: The omission of the words "for public use" in No. 1, instructing that property can neither be taken nor damaged without just compensation, is very plainly immaterial. There was no hint or shadow of a taking or damaging for private use before the jury. How could a sensible jury possibly be misled by it? It would apply to the case before the court. Besides, property cannot be taken either for private or public use without compensation. Instruction 2 tells the jury that "if the injury was caused by the natural flow of the water being changed and cast upon plaintiff's property by the cuttings, or extending drains or ditches, or by filling in the street, or by any or all such cases combined, the defendant is liable." This instruction is ambiguous. For what is a mere change of the flow of surface water incident to the proper work of improvement, even though it do injury to a landowner, if it still spreads out as surface water naturally does, a municipal corporation is not liable in damages; but it cannot collect it in a body, and as such cast it upon land, so as to furrow it out and create or enlarge drain courses through it. You cannot make such ⁵⁴⁵ corporation liable unless your case comes up to that test or standard as shown in *Jordan v. Benwood*, 42 W. Va. 312; 57 Am. St. Rep. 859; *Yeager v. Fairmont*, 43 W. Va. 259. Any other principle would tie the hands of a city. Now, this instruction says that "if the injury be caused by the natural flow being changed and cast upon the property." How cast, in a body, or spreadingly? It does not say. In the one case the city would be liable; in the other, not liable. Does it mean that the flow of water in drains or ditches, and therefore already in a body, was diverted, and thus thrown on the land? The city had a right to fill a street, and, if that fill had any effect to divert surface water so it was still scattered, no liability therefrom arose. Just what theory this instruction presents is uncertain. Does it present a different one from that of No. 3 below? Does it set up a less standard of liability? If so, it is wrong. Does it present the same? Not likely, because it is in different language. And, if the same, then it is unnecessary. It must have been intended to present

a different theory. Just what is indefinite. An indefinite instruction must not be given. How was the jury to reconcile it with No. 3? No. 3: "When a city, in grading its streets, by cutting ditches and drains collects surface water, and casts it in a body upon the lot or ground of the proprietor below, unless it so casts it into a natural watercourse, the proprietor sustains a legal injury, and may recover therefor." This is, on its face, proper. But No. 2 ignores the requirement that the water be cast in a body, and states a less exacting standard of liability, indicating, that mere surface water, in a spreading, scattered condition, will make the town liable. No. 4: "The court instructs the jury that it is the duty of a city, in making improvements upon its streets, to use such skill that improvements so made shall not change the course of the surface water in such manner as to materially injure the property adjoining." This may be good as to negligent doing of work, though the work, if not negligent, do incidentally injure a lot by change of the course of what is surface water, yet if it still spread over the surface, or percolate through the soil, and it is not by the change made to run in destructive currents, plowing drains or courses through the soil and washing it away, ⁵⁴⁶ the city or private landowner is not liable. This instruction disregards that distinction, and asserts that if there be a change, and it do injury, that is enough to fix liability. That is not enough to fix liability. If the work of the corporation does change the former state of things as to surface water so that thereafter it flows in a body or destructive current over the land, the city is liable; otherwise not. No. 5 is good: "The court instructs the jury that, in disposing of surface water, a municipal corporation has no right, by any means whatever, to collect and cast the same upon the property of an individual."

As to the evidence, as the case may be retried it is improper for us to pass on its effect; but, in view of certain evidence bearing on the condition of the drains, I will advert to the law seeming to be pertinent. Our code gives municipal corporations power to construct drains and gutters. They may or may not, as they choose, exercise this power in any street, as the right to elect to do so or not to do so is a matter of discretion, quasi judicial; but when once the corporation decides to do so, and constructs sewers or drains and gutters, the duty has become merely ministerial, and the town bound to keep them in fairly good condition to carry off the water ordinarily and naturally coming into the gutter or sewer in the section where the town

is, so as not to overflow lotowners. The town is not bound for great and unusual floods. If there comes a cloudburst or great rainfall, out of the ordinary experience, and it is too great for the capacity of the drain or gutter, or if it bring down rock, drift, sand, or other debris, choking up the drain, and overflowing, the town is not liable. It is the unexpected—out of the ordinary course of nature. But if the city allows those obstructions to remain—if it allows its drains or gutters to clog up—and damage ensue, it is liable. That is no more than the application of the rule above stated, that the corporation must not in any manner collect or gather surface water in a body, by ditches or drains or gutters, and cast it on a lot owner. If it makes a drain or gutter, it necessarily collects water before then spreading, and it must carry it off. That is only negligence: Elliott on Roads and Streets, 363; Jones on Negligence of Municipal Corporations, sec. 144; 1 Beach on Public Corporations, secs. 764, 767; Hitchins v. Mayor etc., 68 Md. 100; 6 Am. St. Rep. 422; Gilluly v. ⁵⁴⁷ Madison, 63 Wis. 518; 53 Am. Rep. 299; Weis v. Madison, 75 Ind. 241; 39 Am. Rep. 135; 2 Dillon on Municipal Corporations, sec. 1051, cl. 4; Nims v. Mayor etc., 59 N. Y. 500; Richmond v. Long, 17 Gratt. 375, point 3; 94 Am. Dec. 461.

Our conclusion is to reverse the judgment and grant a new trial.

TRESPASS.—POSSESSION alone is sufficient to maintain the action against all the world except the rightful owner: Wilsons v. Bibb, 1 Dana, 7; 25 Am. Dec. 118.

MUNICIPAL CORPORATIONS—SURFACE WATERS—DRAINS AND GUTTERS.—A municipal corporation is liable in damages for collecting water in artificial channels and casting it in a body upon the property of another: Note to Jordan v. Benwood, 57 Am. St. Rep. 868. It is the duty of the city, which collects surface water by artificial means, such as sewers and drains, to provide, by adequate means, for passing off the water thus concentrated in volume, so as to avoid doing damage to private property: Notes to St. Paul etc. R.R. Co. v. Duluth, 45 Am. St. Rep. 494; Cooper v. Dallas, 29 Am. St. Rep. 647; extended note to Goddard v. Harpswell, 30 Am. St. Rep. 389-395. It is the duty of the city, when it provides waterways, to provide such as are sufficient to carry off the water that reasonably might be expected to accumulate: See extended note to Chalkley v. Richmond, 29 Am. St. Rep. 741.

INSTRUCTIONS.—A CONFUSING INSTRUCTION, which leaves a jury in doubt, is error authorizing a new trial: Alexander v. Gibson, 118 N. C. 796; 54 Am. St. Rep. 757.

WILLIAMSON v. JONES.

[43 WEST VIRGINIA, 562.]

REAL PROPERTY.—PETROLEUM OIL, in its place, in the land, is a part of the land itself, just as are coal, timber, and iron.

ESTATES—INJURY TO.—A TENANT FOR LIFE cannot do anything entailing permanent injury to the estate of the reversioner or remainderman.

COTENANCY—LIFE TENANT AND REMAINDERMAN.One who owns three undivided tenths of a parcel of land in possession, and who is the owner of a life estate in the remaining seven-tenths, is a tenant in common with the owners of the seven-tenths.

WASTE—LIFE TENANT.—THE EXTRACTION OF PETROLEUM OIL from land, by a life tenant, without authority, is waste, for which he is answerable to the reversioner or remainderman.

WASTE—LIFE TENANT—BORING FOR OIL—MINING.The offense of waste consists in the first penetration and opening of the soil, as in boring for oil, but it is not waste to dig in mines or pits already open, for an open mine may be worked even to exhaustion by the life tenant.

WASTE—TRESPASS—DISTINCTION.Waste is an injury to the freehold, by one rightfully in possession, such as a cotenant. This marks the distinction between waste and trespass, but the act, whether done by a cotenant or stranger, is a wrong, for which an injured cotenant may have redress.

WASTE—TENANT FOR LIFE—TENANT IN COMMON.Those acts which would be waste in a tenant for life would be waste between tenants in common.

WASTE—TENANT IN COMMON.—THE EXTRACTION OF PETROLEUM OIL from land, by a tenant in common, without authority, is waste, for which he is answerable to his cotenants to the extent of their right in the land.

PERSONAL PROPERTY — UNLAWFUL SEVERANCE FROM REALTY—OWNERSHIP.When that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance.

PERSONAL PROPERTY—PETROLEUM OIL—UNLAWFUL REMOVAL FROM EARTH—OWNERSHIP.Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it.

PERSONAL PROPERTY—PETROLEUM OIL—UNLAWFUL REMOVAL FROM EARTH—OWNERSHIP.If the owner in fee of three undivided tenths of a parcel of land in possession, and who is the owner of a life estate in the remaining seven-tenths, extracts petroleum oil from the land without authority, either as life tenant or as tenant in common, seven-tenths of the oil so extracted belongs to the reversioners or remaindermen.

ESTOPPEL—DECREE OF SALE.One who procures a decree that land shall be sold at a judicial sale, and who receives the proceeds of the sale, is afterward estopped from asserting any interest in petroleum oil extracted from the land.

ESTOPPEL—SILENCE.If one who claims a whole tract of land, in possession, but who owns only a part thereof, in fee, and who is a life tenant of the remainder, makes great expenditures in developing the land as oil territory, the mere silence of the re-

maindermen or reversioners, nearly all of whom are infants and married women, for a period of eighteen months of the time during which such expenditures are being made, does not estop them, in the absence of actual fraud, negligence, or duty to speak out, from asserting their title, particularly where it is not clear that they know their title. They are not bound to go to such person and warn him to desist from his acts, especially where he has knowledge of the defect in his own title.

JUDICIAL SALES—PURCHASER—NOTICE OF WHAT RECORD DISCLOSES.—A purchaser at a judicial sale is conclusively presumed to have notice of all facts disclosed by the record of the case, which touch the rights of others in the property sold.

PARTIES—WHO ARE INDISPENSABLE IN SALE OF FEE.—In a chancery suit to sell the fee of land, not only the owner of the particular estate, but also the owners of the first vested estate, in reversion or remainder, if any, are indispensable parties; and a decree of sale will not affect, or pass, the rights of the remaindermen, if they are not made parties. The appearance of a life tenant as a party, or of a trustee holding for the remaindermen, cannot make the remaindermen parties by representation.

ESTOPPEL—A MARRIED WOMAN is not estopped by mere silence or quiescence from asserting her title to land.

ESTOPPEL.—AN INFANT is not estopped by mere silence or quiescence from asserting title to either real or personal property.

WASTE.—EQUITY HAS JURISDICTION, at the instance of remaindermen, of an injunction to restrain waste committed by a life tenant, or by a tenant in common with them, and may take an account therefor and give compensation for damages. Having jurisdiction for one purpose, it will go on to do complete justice to avoid multiplicity of suits.

WASTE — ACCOUNTING — PROPER BASIS OF — RENTS AND PROFITS.—If one in possession of a tract of land, claiming exclusive ownership, but who owns only a part thereof, and who is a life tenant of the remainder, extracts petroleum oil therefrom, without authority, and converts it to his own use, he must account therefor, not simply for an annual rental, but on the basis of net rents and profits. The remaindermen are entitled to recover the money he actually received for the oil, if ascertainable; if not, its value.

WASTE—INTEREST ON PROCEEDS—RIGHT TO.—If a life tenant commits waste by taking petroleum oil from the land, without authority, he is not entitled to the oil, and has no right to the income of interest from its proceeds during the existence of the life estate. Such proceeds go at once to the owners of the next vested estate of inheritance, or remaindermen.

REAL PROPERTY — ALLOWANCE FOR IMPROVEMENTS.—Under the statute of West Virginia one is entitled to compensation for permanent improvements placed by him on another's land if he put them there at a time when he believed his own title to be good.

REAL PROPERTY—COMPENSATION FOR IMPROVEMENTS.—One is not ordinarily entitled to compensation for permanent improvements placed by him on another's land, if, when making them, he had notice, actual or constructive, of the superior right of another; neither is he entitled, at law, to such compensation, where he has notice of facts rendering his title defective, but, by mistake of law, regards it as good.

RENTS AND PROFITS—IMPROVEMENTS.—IN AN ACCOUNT for rents and profits, where one has made permanent im-

provements upon the land of another, the improver must be charged for the property in its condition before his improvements, and not with the profits of his improvements.

WASTE—CREDIT, IN EQUITY, AGAINST RENTS AND PROFITS—EXPENSES OF PRODUCING OIL—SETOFF.—In an action by remaindermen against a life tenant for waste in extracting oil from the land without authority, the plaintiffs must do equity if they ask equity. Hence, if by reason of the energy and risk of the life tenant, he has developed the hitherto worthless land into an oil field of almost amazing wealth, it is not inconsistent for a court of equity to allow him, as a setoff against rents and profits, all costs of producing the oil, including the cost of boring productive wells, for, by the natural law, it is not right that anyone should grow rich by the detriment and injury of another.

Bill by Eliza Williamson and others against J. T. Jones and others. The complainants obtained a decree, and the defendant, Jones, appealed.

Caldwell & Caldwell, for the appellant.

W. P. Hubbard, Thomas L. Steatey, H. P. Camden, and George E. Boyd, for the appellees.

564 BRANNON, J. I refer to the report of a former decision in this case for a full statement of the facts: Williamson v. Jones, 39 W. Va. 231. Under the judicial sale, Jones thought and claimed that he purchased the entirety of the two tracts—one of one hundred and sixty-five acres, and the other forty-five poles; but, as seven undivided tenths vested by the will of David Hickman in Engle, as trustee, to hold for the use of his daughter Eliza Williamson for her life, with remainder to her sisters, and as the remaindermen were not parties to the suit, the decree of sale, and sale under it, were void and ineffectual to pass anything but the life estate in those seven-tenths; and so the remainder in them did not pass under the sale, but remained in the sisters of Eliza Williamson. Jones, however, took exclusive possession, claiming 565 the whole. He bored twenty-three wells in the pursuit and production of petroleum oil. The plaintiffs sued him in equity to enjoin his further production of oil, and for an account of what he had produced. After the decision upon a former appeal an account was taken, and the circuit court held that Jones pay the owners of the seven-tenths of the land for one-eighth of seven-tenths of the oil produced, and seven-tenths of the value of the timber taken from the land, thus charging Jones only for one-eighth of the oil, that being the usual rent, commonly called "royalty," in that section stipulated and paid to the landowner under oil leases. Jones appeals, and he assigns error in charg-

ing him with anything at all, and for other causes; and the plaintiffs cross-assign error in charging Jones only with one-eighth, and for other causes.

We start with the fact that Jones was owner of three undivided tenths in fee in possession, and owner of a life estate for the life of Mrs. Williamson in the remaining seven-tenths, and the plaintiffs owners of the remainder in fee in those seven-tenths after the end of the life estate, a vested remainder; and, in this condition of right to the land, Jones bored twenty-three wells upon the land, and produced, from May, 1892, to December 21, 1895, six hundred and twenty-two thousand two hundred and eighty-one barrels of petroleum oil therefrom, valued at five hundred thousand two hundred and ninety-eight dollars. Did he have right to bore for this oil? He claims that he had, and that every barrel of it is his, without liability to account to the plaintiffs; while the plaintiffs claim that he had no right to bore and produce this oil, but, having done so, he must account to them for full seven-tenths. Did Jones, as tenant for life, have right to extract this oil? He had not. Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron: *Bettman v. Harness*, 42 W. Va. 433; *Williamson v. Jones*, 39 W. Va. 231. A tenant for life cannot do anything entailing permanent injury to the estate of the remainderman or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals: 1 *Lomax's Digest*, 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste: *University v. Tucker*, 31 W. Va. 566 622. It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so doing himself: 1 *Washburn on Real Property*, sec. 24, p. 116; 1 *Lomax's Digest*, 57. Therefore, when Jones himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remaindermen could sue him in an action of waste, as at common law under the English statute of Malbridge, or in action of trespass on the case under chapter 92 of the code, and recover the full value of their seven-tenths.

It is sought to show that Jones, as life tenant, had right to all the oil, by the case of *Koen v. Bartlett*, 41 W. Va. 559, 36 Am. St. Rep. 884, but that case will not sustain this claim. It asserts only that a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence.

There the owner in fee had made a lease for oil, with a royalty as rent, and then conveyed the fee, reserving a life estate, and it was held that he, as life tenant, was entitled, as against the remainderman, to the royalty; but there the owner had authorized the boring for oil, and the conveyance was subject, in terms, to the lease, and, though the boring had not produced wells open at the commencement of the life estate, they were bored, under authority, during its continuance. We held that a mine bored in the period of the life estate, under prior authority, was to be deemed as if an open mine at the commencement of the life estate. It is established that an open mine may be worked to even exhaustion by the life tenant: *Crouch v. Puryear*, 1 Rand. 258; 10 Am. Dec. 528; 1 Lomax's Digest, 54. The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land: *Taylor on Landlord and Tenants*, sec. 249 a. When Jones penetrated the soil, he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 884, is no help for him. It may occur that, if Jones could not, his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant, he was entitled to none of it. Such is the quality of that estate.

⁵⁰⁷ Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three-tenths gave him right to do so. Jones was a tenant in common with the owners of the seven-tenths. By the old law one tenant in common was not liable to another for waste; but our code of 1891, chapter 92, section 2, has remedied this unreasonable rule by making tenants in common, joint tenants, and parceners liable for waste: 1 Lomax's Digest, 499; 2 Minor's Institutes, 620. Then we have simply to inquire whether the extraction of oil is waste, and, under authorities above given, we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common. As the statute uses the law word "waste," we must give it the legal meaning as applied to tenants for life: *Elwell v. Burnside*, 44 Barb. 447. Chapter 100, section 14 of the code of 1891 gives an action of account between tenants in common for receiving more than his just share—that is, more than his just share of rents and profits from the legitimate use of land; but this has

no reference to waste. It does not license waste. There stands section 2, chapter 92, branding it as a tort, and giving action for it, and it applies, though one claim title to the whole, and commit waste: 28 Am. & Eng. Ency. of Law, 895. As owner of three-tenths in fee, Jones could not bore for oil, any more than a stranger, because the act, whether done by a cotenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned. He had right to possession for residence or other ordinary use working no injury to the inheritance, and therefore we term his act waste, not technically trespass as done by a stranger. "Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass": 1 White and Tudor's Leading Cases in Equity, 1011. But the nature of the act is a tort in both cases—the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty into personalty, the injured cotenants may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Indeed, Jones claimed to own the whole land, repudiated any co-ownership with the Hickman heirs, and thus assigned to ⁵⁶⁸ himself the position of a stranger. This, however, only strengthens the argument that he is to be regarded a wrongdoer against the owners of the seven-tenths, as the statute makes him a wrongdoer though he were regarded as a tenant in common. It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been already opened, Jones, as cotenant, might set up claim under his three-tenths interest to work them, and take all profits under some cases: *McCord v. Oakland* etc. Min. Co., 64 Cal. 134; 49 Am. Rep. 686; though I should think he would have to account under section 14, chapter 100 of the code: *Rust v. Rust*, 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil. If he chose to do so, of every gallon seven-tenths belonged to the owners of the seven-tenths in the land, because it had been part of their soil. These considerations repel all idea that as owner of the fee in three-tenths he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. It is true, an

expression in a former opinion in this case said that Jones, as owner of three-tenths, had right to bore for oil, so he took no more than his share. This is not announced as law in the syllabus. On examination I find no warrant for this expression. The only materiality for this is, that it may be claimed to enter into the process of the accounting for the oil, as, if its extraction was lawful, the charge against Jones might be different from what it would be if regarded a wrongdoer. It is, however, sought to be made by counsel a weapon of great potency. Counsel say that this court in the former opinion said that, the act of boring being lawful, and lawfulness of severance gave him who severed it the right to keep the whole, just as the right to use open mines by a life tenant gives him all the product, because he has right to sever. But in this case the severance is unlawful, and the legal deduction fails. Counsel from that expression would say further that when David Hickman, as owner of the seven-tenths, gave Mrs. Williamson a life estate, as he must have known as a matter ⁵⁶⁹ of law that the owners of the other three-tenths would have the right to produce oil, he must be understood as contemplating that they might do so, and is to be taken as intending, if they did, that the life tenant should enjoy all the seven-tenths of the oil. As the owners of the three-tenths had no such right, the argument here again fails. In addition, this would give the life tenant, by mere implication (remote and weak implication at that), a right to what her devise did not carry as an incident—things a part of the soil, which can only go with it by express grant. It is argued that Hickman, in his devise of a life estate to his favorite daughter, Mrs. Williamson, did not prohibit waste; but as Judge Roane said in Findlay v. Smith, 6 Munf. 148, 8 Am. Dec. 733, exemption from waste cannot result “from the omission to restrict waste in the will. That omission became unnecessary from the limited nature of the estate granted. The estate granted was only an estate for life, and it is incident thereto that waste shall not be committed. It would have been a work of supererogation to have inserted such a restriction, and the question may properly be retorted, why, if it were so intended, was not waste specially permitted by the will? This is not only not done, but the contrary is done, by granting an estate which carries with it the restriction as an incident. The silence of the will, in this particular, cannot weaken the rights of those in remainder. It cannot destroy rights conferred by law.” At one time, to restrict a life tenant from waste, there

must be a restriction in the grant; but now all tenants are forbidden to do waste by statute, unless their grant render them expressly unimpeachable for waste: 2 Minor's Institutes, 616, 619; 1 Lomax's Digest, 56; 1 Washburn on Real Property, 107. Of course, when that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance, as he owns it: University v. Tucker, 31 W. Va. 621; Fearn on Remedies, 341; Whitfield v. Bewit, 2 P. Wms. 240; 1 Lomax's Digest, 56. The owner of the severed chattel can alone seize it, or bring trover for its conversion, as it came from the inheritance, or claim the thing itself by replevy, or detinue, or bring trespass de bonis asportatis, for damages for the taking of it, or assumpsit for money had and received from it. "Nor does it matter ⁵⁷⁰ whether the timber is cut by a stranger or by the tenant (for life) himself, since the tenant cannot convey any interest in it when severed": 1 Washburn on Real Property, 119; 1 Lomax's Digest, 59; Freeman on Cotenancy, secs. 297, 302. For the same reason the cotenant doing waste neither owns nor can sell what is not his. "If, at the time of the improper working, there is any person in being entitled, defeasibly or indefeasibly, to an estate of inheritance, the property in the severed chattels, or the amount to be accounted for, will belong absolutely and immediately to such person, or, if more than one, to the first of such persons, and his right is not affected by the circumstances that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life in being even without impeachment of waste": McSwinney on Mines, c. 3, sec. 2 (B), p. 99; 1 Lomax's Digest, 56, 57; Pigot v. Bullock, 1 Ves. Jr. 479; Birch-Wolfe v. Birch, L. R. 9 Eq. 683. This shows that Jones, as owner of the life estate intervening before the seven-tenths would be vested in possession, could not keep the oil. "Oil in the earth belongs to the owner of the land, and, when unlawfully taken therefrom by a wrongdoer, the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it": Hughes v. United Pipe Line, 119 N. Y. 423. It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss

from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainderman, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land. Here Jones was himself the life tenant: 1 Lomax's Digest, 60; Story's Equity Jurisprudence, sec. 919. Thus the owners of the seven-tenths in the land had plain legal title, and their rights are such as above given to seven-tenths of the oil ⁵⁷¹ unless something not yet considered debars them from such rights.

It is urged strenuously, with great elaboration and ability, by counsel, that they are barred by the doctrine of estoppel in pais; that their conduct works this result. Here I first remark that a clear legal title to land, requiring written conveyance to transfer it, is, by this theory, to be divested out of its owners, and invested practically as effectually in others as if such conveyance existed. A clear, strong case of estoppel is required for such a result. What is the conduct of these parties bringing about this result? As to Mrs. Williamson, she, having procured the decree of sale, and received its proceeds, is estopped. That is *res judicata* under our former decision. As to the other devisees of David Hickman, what have they done or left undone to estop them? It is said they ought to have made themselves parties to this suit. There is no force in this. Perhaps they did not want their land sold. There was no ground for the sale of their remainder for the debts of Thomas Jones, deceased, except, perhaps, one of their seven-tenths, as Jones' heirs had conveyed their interest before the suit. If anybody wanted to sell their land for debt, or because partition could not be made, or other cause, he must bring them and their estate before the court. Strange that anyone is to lose his land because he did not cause himself to be sued. Counsel for Jones make their chief point under this head of estoppel by saying: "Because these plaintiffs stood by for eighteen months, and made no claim to the land or oil, knowing that Captain Jones in good faith, and believing he had a perfect title in fee simple to the farm, was making great expenditures on the land in developing it as oil territory, and had paid forty thousand dollars to buy interests of his copurchasers, Tennant and Haskell, and paid up the deferred installments of the purchase money for the land, which he would not have done unless he had believed that he had the sole and un-

questioned title thereto, the said plaintiffs intending, if Captain Jones succeeded in developing the farm as oil territory, to bring this suit. If he did not succeed, they would let the sale stand without attack, and they would finally take and enjoy the avails and proceeds of the ⁵⁷² same." By no means does the evidence sustain these predications.

Admit, however, these as facts, they do not bar the plaintiffs. First, they do not predicate, nor does any evidence, any contract between the parties, giving Jones a right. The plaintiffs stand in no wise bound to Jones by any contractual relation. Then, to bar them, you must show such conduct as is misconduct amounting to fraud, and this is not shown by these facts, or others in the circumference of the case. Most of the cases cited to support this estoppel are cases in which there was privity or obligation springing from contract, or constructive or other trust. Such are *Clarke v. Hart*, 6 H. L. Cas. 633; *Sumner v. Seaton*, 47 N. J. Eq. 119; *Galliher v. Cadwell*, 145 U. S. 372. There is no contract or trust here. Not the slightest obligation under contract, trust, or fiduciary relation bound these Hickman devisees to Jones. Let us see what is an estoppel by conduct. Let us see whether the defendants can meet its requirements. "An estoppel in pais operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up." Judge English, in *Norfolk etc. R. R. Co. v. Perdue*, 40 W. Va. 454, says that for an estoppel in pais there must be conduct, acts, language, or silence amounting to a representation or concealment of material facts, and the misrepresented or concealed facts known to the party sought to be charged with the estoppel, and unknown to the other party, and the conduct must be with the expectation that it will be acted on, or will likely be; and Judge English further said: "The general rule is, that if a person interested in an estate knowingly misleads another into dealing with it, as if he were not interested, he will be compelled to make his representation good. It applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land, or loan upon it; to one who knowingly suffers another to deal with ⁵⁷³ the land as though it were his own, or to expend money in improve-

ments without giving notice of his own claim or the like. In the light of the most recent decisions, to preclude the owner of land from asserting his legal title under such circumstances, there must be shown either actual fraud or negligence equivalent to fraud in concealing his title, or that he was silent when the circumstances would compel an honest man to speak." The plaintiffs never accepted a dollar of the sale of the land under the decree. These plaintiffs were not at the judicial sale, standing by silent, or at the place of improvement; never said a word denying their title; never renounced it; never induced Tennant or Jones to buy or bore; never were inquired of as to their title; never were placed in such circumstances as to call upon them legally, nor perhaps even morally, to speak out. All they are guilty of is silence, quiescence. They did not, it is true, seek Jones, and warn him. This is their offense, in length and breadth. Under the doctrine of estoppel above given, this is not enough. Bigelow on Frauds, 590, says: "Having now considered the subject of deception by act on all sides, we are next brought to the subject of deception by omission; in the case of silence, where there was a duty to speak. Now, silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby. A man's unpublished thought is surely his own. But it must be understood at the outset that by silence we mean entire silence, as distinguished from that sort which merely keeps back part of the truth sold or suggested. But, speaking of pure silence, the general rule stated is very strong. It governs even though the silence is meditated, and with knowledge that the other party was laboring under mistake or ignorance." These people were not bound to volunteer to warn Jones, and we can the more excuse them for silence and inaction—all they are guilty of—when we reflect that, if they knew anything about the title's condition, they knew Captain Jones held the life estate, and they would have no right to possession until its end, which exculpates them from any animadversion for intentional wrong.

Again, it is not clear they knew their title, especially as some—nearly all—were infants and married women. If a ⁵⁷⁴ business man like the defendant could not judge correctly of his title, could they? Moreover, I say that if one man chooses to go upon another's land, and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title. He is given the time fixed by the statute of limitations, though he do know that his adver-

sary is expending money in improvements. He may every week pass along and see the work. Mere silence will not rob him of title until time does the work under the statute. Unless there is a duty to speak out, one need not. "To create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told": *Veile v. Judson*, 82 N. Y. 40. There is no proof that these parties knew Jones was relying on them or their silence, and in fact he shows himself he did not. But I say the test just put in the New York case is not strong enough. Mere silence and knowledge that another is relying on it is not enough. He must be brought into such close quarters or situation toward him as to call on him to speak out. Again, a potent fact against Jones on this estoppel is, that before Tennant, who, as his agent, bought at the judicial sale, Jones knew of the defect of the title.

1. The record in the cases stated that Thomas Jones died leaving ten heirs; and the petition of Engle and Williamson, on which the sale of the whole tract was first based, stated that Eliza Williamson only owned a life estate in seven-tenths. Who owned the remainder? The very decree of sale declares: "It appearing to the court that the interests held by C. Engle as trustee as aforesaid are for the use and benefit for life of Eliza Williamson by virtue of a provision in the will and codicil of said David Hickman." Who owned the remainder? This record put this question to a purchaser. Prudence would make a man inquire where the real estate in the land was. A purchaser at a court sale purchases under the rule of caveat emptor (look out buyer). The court or commissioner warrants nothing. One buying at such a sale is held—conclusively held—to have notice of all the facts which the record, if inspected, would communicate: *Stout v. Philippi Mercantile Co.*, 41 575 W. Va. 339; 56 Am. St. Rep. 843; *Pomeroy's Equity Jurisprudence*, sec. 626; *Wood v. Krebbs*, 30 Gratt. 708; *Burwell v. Fauber*, 21 Gratt. 446. Where one claimed for improvements, such record notice was held enough to debar him as showing that he did not improve with bona fide belief that his title was good: *Hall v. Hall*, 30 W. Va. 785. Jones had actual notice of this defect of title, and of the fact that the plaintiffs owned the seven-tenths as the remainder. He, as a witness, says his agent, Tennant, to procure oil leases, reported to him that a lease of this land from Mrs. Williamson would not be safe, "as she only owned part in fee and a life interest in the balance," and the only way was to

buy it. This knowledge defeats his plea of estoppel under cases cited above, and *Bettman v. Harness*, 42 W. Va. 433, and *Dawson v. Grow*, 29 W. Va. 333. A small modicum of prudence would have saved him. He heeded not this warning, but venturesomely risks a purchase, and the expenditure of his money. He was not moved by any words or act or representation of the plaintiffs, nor by their silence, but hazarded his action in the spirit of speculation, not relying on their silence, but his own judgment. Jones says he claimed the whole, and would not have heeded the claim of the plaintiffs, if they had made it. It would not have stopped this expenditure. How can he lay his misfortune at their door? His counsel argue that the commissioner who sold told him it was a good title. Jones says he did not say he did so until July, 1893, and he had then bored all but two or three wells. But what if he did? Are these plaintiffs responsible, even if the lawyer told him that it was not necessary to make the remaindermen parties? This mistake, in legal opinion, does not bind the plaintiffs. He was not their lawyer. He had no authority, as commissioner, to bind them, or guarantee title, and they were not parties to the suit even. It is argued that the sale was made under decree with the knowledge and desire of the remaindermen, and this position is sought to be supported on circumstances entirely inadequate to sustain this contention. The judge who rendered the sale decree was father to children of one of the remaindermen, the commissioner was husband to another, and a son of David Hickman performed the clerical work of recording the decree; ⁵⁷⁶ and the remaindermen must therefore have known of, and been satisfied with, the decree, say counsel. This does not follow. Suppose they did know it, and were satisfied. If they did nothing active, it is not enough. One with legal title to land cannot, by oral disclaimer of right, even the most expressed, divest himself of legal right: *Cline v. Catron*, 22 Gratt. 378; *Jackson v. Davis*, 15 Am. Dec. 451.

Counsel would explain why these remaindermen were not made parties, saying the lawyer in the case thought, as Jones, heirs were parties, and Mrs. Williamson owner of a life estate in seven-tenths and three-tenths in fee, they were not necessary parties, as Hickman purchased shares of Jones' heirs after his death, and they were liable to his debts. They were not liable, except one of the seven-tenths; and anyhow they owned legal title to the remainder in fee, and were absolutely necessary parties, and neither they nor their estate were before the court, and

their estate was not sold under the decree, and it was a nullity as to the remaindermen. No matter who made the mistake in the conduct of the suit, or how it came about, it could not prejudice these remaindermen. They can be bound only by record, not by a mere supposition, or even proof, that they knew or approved of it. The decree and deed under it conveyed no title. Mrs. Williamson, though before the court, was only life tenant of the seven-tenths, and there is no privity between life tenant and remaindermen, so that the presence of a life tenant as a party by representation makes the remainderman a party. "A stranger, who is not a party or a privy, can neither be barred nor aided" by a judgment or decree: Barton's Chancery Practice, 213; 2 Pomeroy's Equity Jurisprudence, sec. 813. Engle was a dry trustee; the real owners of the remainder were the remaindermen. The trustee could not represent their interest. Even a creditor under a deed of trust, not merely a trustee, must be a party; much more the remainderman in a case of dry trusteeship, where it is proposed to sell the very corpus or fee of the land, and all rights whatsoever therein. It is essential that there be before the court not merely the owner of particular estate, but also the owner of the first vested estate in reversion or remainder, and this was in these remaindermen: 1 Daniell's Chancery Practice, 227, 228; 577 Story's Equity Pleading, secs. 144, 145; opinion in Faulkner v. Davis, 18 Gratt. 684; 98 Am. Dec. 698. The trustee and life tenant not representing the remaindermen, and they being necessary parties to bring the fee of the land before the court, they are not bound by the sale. But this was decided on the former decision. Counsel ask, why, if the plaintiffs did not acquiesce in the sale, did they not adduce evidence to show that they did not? The burden to show acquiescence is on the defendant asserting it. Mere acquiescence, if proven, would not divest their title. If these parties knew of the sale and boring, which is only by mere inference, there is evidence tending to show that they thought it was only Mrs. Williamson's interest that was sold, as she is shown to have been anxious to get rid of the land. It is not clear they knew of it; but what if they did? Can their land be taken from them merely for that? So I conclude that estoppel in pais will not defeat the plain, legal right of the plaintiffs. But, as some of them were infants and married women, even if there were facts to show such estoppel as is here contended for, it would not bind the married women or infants. They would not be guilty of such a fraud as would estop them.

The title of these plaintiffs vested before April 1, 1869, and therefore the interests of the married woman were not separate estate. A distinction is made in a brief between land that is separate estate and that not separate estate, the theory being that as to separate estate the married woman may lose it by estoppel in pais, whereas she cannot so lose land not separate estate; but as, under our statute, her sole deed is void in both cases, and she could only pass either class of land by a deed with privy examination (when this transaction occurred), and now by acknowledgments, her husband joining, I do not see where any distinction comes in. Whether a married woman, by positive, intentional fraud, can lose her land, when her sole deed will not divest her of it, the authorities are divided. I should say that, as the law scrupulously limits her power of alienation to one only mode, she could not do so; that she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by an act of hers to part with her land except in one way: Bigelow 578 on Estoppel, 599; Bishop on Married Women, sec. 488; 2 Herman on Estoppel, sec. 1102. Note that I am speaking of her losing her land, not personalty, for I think she may thus lose her personalty, as she is competent to sell that. But in this case no affirmative act of fraudulent representation is shown; only silence. If I be right in the position that actual fraudulent representation would not lose her right, for stronger reason mere silence would not; but, even if positive, affirmative fraud would lose her land, mere silence would not. 14 American and English Encyclopedia of Law, 643, says that, as "such estoppels as arise out of failure to assert a right, or out of silence or acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by silence and acquiescence only in cases where she would have been bound had she expressly made the statement implied. Thus, where a married woman makes a void deed, she is not estopped, by afterward recognizing its validity and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto; but, if she could contract as a feme sole, and allowed the grantee to improve the property on the faith of a title given him by her, she could not deny the validity of that title." It is cautious to observe that the law books say that, in order that a fraud by a married woman shall constitute an estoppel against

her, it must be unconnected with a contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it; but that was when she was disabled from contracting; and, now that our statute has fully enabled her to contract, I think that any fraudulent act which would estop her when not connected with a contract would also do so though connected with a contract. This limitation proceeded from her disability, and, that having been removed, the limitation would be removed: Bishop on Married Women, sec. 493; 1 Pomeroy's Equity Jurisprudence, sec. 418; Tufts v. Copen, 37 W. Va. 629. But observe, further, that as to selling and conveying her land she remains under limited disability. Wherefore, I am clearly of opinion that the mere silence or inaction ⁵⁷⁹ of the married women—their quiescence, for it is not acquiescence—does not bar them.

How as to infants? Positive intentional fraud would bar an infant of years of discretion, but mere silence or quiescence surely will not. I think the weight of authority is that matter sufficient to raise an estoppel, if unconnected with a contract, would bar an infant from asserting a right even to land. It must, however, be intentionally fraudulent. Mere silence or quiescence, as in this case, will not do so: Bigelow on Estoppel, 600; 2 Pomeroy's Equity Jurisprudence, sec. 815. The deed of a married woman is void; an infant's only voidable—a difference.

I have discussed the question whether or not the plaintiffs are barred by the doctrine of estoppel in pais as an open question unaffected by the former decision, though it may be said plausibly that it did decide against that defense, in deciding that Jones must account on some basis. If a good bar, he would not have to account, and the court would have dismissed the bill. That decision did not decide finally that Jones rightfully bored for oil. It did not decide how much Jones should be charged, nor on what basis. That decision was, in terms, in these matters, not final, but provisional.

There cannot possibly be anything in the contention that laches bars relief. The delay from the judicial sale was only eighteen months; from the commencement of boring, some less. The statute of limitations gives ten years. The many cases of laches cited are cases of deeds or other things procured by fraud, as in Whittaker v. Southwest etc. Improvement Co., 34 W. Va. 230, where there must be promptness. Here is no such case, but simply one in adverse claim of another's land, or ouster by one tenant in common, or a suit to make Jones account for oil

taken from the land; the statute giving five years. Why, in such case, plead laches short of the period fixed by statute? Viewed as a suit to recover possession—but it is not—time would not begin until the end of the life estate: *Merritt v. Hughes*, 36 W. Va. 357; *Arnold v. Bunnell*, 42 W. Va. 473. Time has no weight in any view of this case.

Having reached the conclusion that the plaintiffs have right to relief, the next question is as to what shall be ⁵⁸⁰ charged to Jones, or the mode of account. It is not questioned, but may be stated as law pertinent to the case, that, though action at law in case for waste, or trover, or trespass de bonis, or perhaps pure trespass would lie, yet equity can take the account. It has indubitable jurisdiction for an injunction to restrain the waste: *Bettman v. Harness*, 42 W. Va. 433; *Williamson v. Jones*, 39 W. Va. 231. Having jurisdiction for one purpose, it will go on to do complete justice to avoid multiplicity of suits: *Chrislip v. Teter*, 43 W. Va. 356. And with respect to a suit of this particular cast to enjoin waste, it is clear equity will take an account, and give compensation for damages: *Story's Equity Jurisprudence*, sec. 517; 1 *Washburn on Real Property*, 126. As above stated, Jones had no right to any of the oil as life tenant. As owner of the three-tenths of the land, he had no right to produce the oil, and his act in so doing was one of waste. When he did extract the oil, seven-tenths of it was by right and title oil of the plaintiffs, the very oil itself, because taken from their land. Jones converted this, their property, to his own use. They are entitled to recover the money he received for it, if ascertainable; if not, its value. It is urged that in a former opinion it is said that Jones had right to bore, so he did not take more than his share of the oil. Would not that leave the balance the property of the plaintiffs? I do not see that this expression that he had right to bore is material, unless it show, as counsel seeks to use it, that having the right to bore, Jones had the right to keep all the oil; but that the opinion in words denies. The plaintiffs owned seven-tenths of the oil when it reached the surface. It has been converted to his own use by Jones. He claiming all the land, would be an ouster, took the oil under adverse hostile claim, as an act of trespass. Indeed, the plaintiffs can treat it as an ouster. It is not a question of rent in the shape of royalty of one-eighth of the oil or otherwise, for royalty is rent, and springs from contract; and there was nothing contractual between these parties. If a stranger had bored, could the plaintiffs not render him liable for the conver-

sion of their oil? Jones is as a stranger, a hostile claimant shutting them out; and, even if he had not claimed the whole land, but acknowledged their right to part of the land, the ⁵⁸¹ taking of the oil was waste, and gave him no right to their share. The former opinion says this.

It is claimed for Jones, if he is not allowed all the oil, he should pay only one-eighth of the seven-eighths as royalty. If he had worked already open wells, it might be more plausible to say so; but he first penetrated the soil as a wrongdoer, in a legal view. If an open well, it would be lawfully used by a life tenant, and probably by a tenant in common, as one mode of enjoyment of his share. I say probably. That matter is not before us. *Rust v. Rust*, 17 W. Va. 901, holds that where one tenant in common occupies the whole property he is liable to cotenants for a reasonable rent for it in the condition it was in when he took possession. This is approved in the opinion in *Dodson v. Hays*, 29 W. Va. 601. This doctrine follows *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649. In the two West Virginia cases the use of the land was for ordinary purposes, not extracting minerals, and the occupying tenant had right to occupy and farm the land. The *Early* case was the use of a salt well opened before the commencement of the cotenancy, and perhaps the use of the salt water in making salt by the occupying tenant was lawful, as the use of the land in the condition it was in when he went upon it, and as it had been used by the ancestor. And besides, between him and some of the co-owners, there was a stipulated rent, which the judge gives as a reason for the charge of a rent; and besides he says the occupying cotenant and the others regarded it as a renting. And the court refrained from laying this down as an inexorable rule, saying there might be cases calling for an account of rents and profits. The case in hand is a case of a different hue; not the case of one cropping the land in that legitimate use which a tenant in common may make of the land; not use of open salt or oil well, which likely can be used by one tenant as it had been before; but where one pierces the earth, and takes from its place oil that is a part of the realty—an act not of legitimate use, but destruction and waste of the inheritance of the others. Almost an exactly similar case to the one in hand is *Ruffners v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513, where persons claiming adversely to plaintiffs were held tenants in common with them, and had sole occupation, and had discovered salt, ⁵⁸² and bored wells. Great controversy arose as to the mode of charge against them. Held

chargeable, not with rental, but rents and profits, if any made, with credit for expenses and improvements. *Graham v. Pierce*, 19 Gratt. 28, is like unto this case. It was a case of lead mines, where parties jointly operated them for a time, and one continued to use the open mines. President Moncure said: "The court is further of opinion that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his cotenants, or occupies more of the common property than his just share or proportion, the best measure of his accountability to his cotenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early v. Friend*, 16 Gratt. 21, 52, 54; 78 Am. Dec. 649; yet, as was said in that case, there may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, et cetera, as a mode of adjustment between the tenants in common: *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513." "Under the circumstances of this case, it was proper to resort to an account of issues, profits, et cetera, as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for the use and occupation; nor is it such a case as that of *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, or to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its ⁵⁸³ degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account,

and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine." If the difference in the nature of a lead mine and a salt works was such as to require in the case of the former an account of rents and profits, with how much more force are we driven to the conclusion that in a property such as that in the case at bar, consisting of oil wells, the yearly value of which was still more uncertain and difficult of ascertainment, in which the cost of operation is still more uncertain than that of the lead mine, the account must be taken as one of rents and profits.

In *Newman v. Newman*, 27 Gratt. 722, the court had to determine the basis of an account between cotenants of an iron mine. On pages 722 and 723, President Moncure refers to the cases of *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658, and *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649, and quotes *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658, the distinctions between the two cases there stated. The opinion says: "That was the case of a lead mine, while this is the case of an iron mine; and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself, and maybe such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties; whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allowing ⁵⁸⁴ interest to the party who advances the capital. In this case the property was of known and established value, and there would probably have been no difficulty in finding a suitable agent, and borrowing the necessary capital to carry on the operations, even if both had not been readily furnished by one of the parties." As counsel say: "Here are pointed out other facts which are also found in the case at bar, and which, it seems to me, are controlling, and require the application to this case of the rule in *Graham v. Pierce*, 19 Gratt.

28. These facts are that the development of oil property necessarily uses part of the subject itself more rapidly and completely than in the case of a lead mine, and renders the residue of the subject of no value whatever. It is even more true of an oil well than a lead mine that explorations and operations may show that it is of great value, or the contrary. The speculation and hazard are more in the case of an oil well than in that of a lead mine. Indeed, all that is said by Judge Moncure in *Newman v. Newman*, 27 Gratt. 722, as quoted above, is applicable with added force in the case at bar. In both the Virginia cases in which a rent was charged (actually in one, nominally in the other) the property consisted of open mines, and the parties interested had theretofore settled accounts on the basis of a rent. Neither of those facts exist here, where the wells were not open; no rent had theretofore been charged, and the inheritance itself was being taken."

In *Dodge v. Davis*, 85 Iowa, 77, 81, 82, an instruction was held proper that a tenant in common was entitled to recover from a defendant cotenant, who had ousted him, claiming exclusive right to use the land, in addition to a fair rent for the use of the premises, his share of the fair market value of the trees or timber, if any, that defendant sold to third parties off of said land. In *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487, relating to a gold mine, it was held: "A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his cotenant, who therefore stands to him as principal. He consequently is bound to pay his cotenant the actual profits which he has made out of such surplus, as well as the surplus itself." In *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372, the defendant cotenant was held liable for profits, and not for ⁵⁸⁵ rent. In *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473, the inquiry was to the profits received, and not the rent due. In *Pearson v. Carlton*, 18 S. C. 47, an account for rents and profits was held proper. This was a case where land was sold under decree where an heir was not a party, and he was given partition in rents and profits. That case refers to *Jones v. Massey*, 14 S. C. 292, which held that the accounting should be of rents and profits, and not of rental value. Such was the accounting in *Dewing v. Dewing*, 165 Mass. 230. In *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 442, the court, after construing the statute of Anne, say: "Where the cotenant has actually received the rent of the common property, or has converted coal, timber, gas, oil, or minerals—part thereof

—into cash, and retains a share thereof which actually belongs to his co-owner, there would seem to be no good reason why, in a proper case, he may not be sued in assumpsit for his cotenant's share thereof": See, also, *Fiquet v. Allison*, 12 Mich. 328; 86 Am. Dec. 54; *Loomis v. O'Neal*, 73 Mich. 582; *Tuttle v. Campbell*, 74 Mich. 662; 16 Am. St. Rep. 652. "In *Job v. Potton*, L. R. 20 Eq. 84, 97, the court regarded the defendant cotenant as having been in all respects blameless, not a willful wrongdoer against whom the accounts would be taken rigorously, not negligent or tortious; so that, while he would be allowed for bringing the coal to the pit's mouth, but not for the expense of severance, but as having produced the coal in the exercise of a strict right, and decreed an account against the defendant for the value at the pit's mouth of the coal raised, less the cost of getting and raising it. The idea that he should be dismissed on payment of a rent does not seem to have occurred to anyone."

It does seem to me on authority and reason that an account of rents and profits is the true basis. I cannot see how, where there is no lease, no contract, no tacit understanding between the parties, no past mode of business, but one not the true owner has used and received rents and profits from land of other people, you can charge an annual rental, and not their fraction of rents and profits received by the occupier.

What is to be done with the money to which the plaintiffs are entitled? Does it go to them at once, or is it to be put at 5% interest, and Jones, as life tenant, get the interest on it, during *Eliza Williamson's* life, or a certain sum for its present worth?

As above shown, by reference to *McSwinney on Mines*, it goes at once to the plaintiffs, and Jones has no right to interest on it during the life estate: 1. Because he is, in a legal point of view, a wrongdoer, and, if given interest, this would give him the benefit of his own wrong. In *Williams v. Duke of Bolton*, 1 Cox, 72, 3 P. Wms. 268, a tenant for life committing waste, who owned the next existent estate of inheritance, subject to an intermediate contingent remainder, was not allowed to take advantage of his own wrong in cutting timber, but the fund was kept for the contingent remaindermen, and he was made to pay interest on it from the time the money for the timber was received. There are instances where the reversioner or remainderman, during a life estate in another, wrongfully severs minerals, the proceeds are invested, and the income paid to the life tenant during life, though the minerals really belonged to the wrongdoer, because he could not take advantage of his wrong against the tenant: *Mc-*

Swinney on Mines, 65. This is doubtful, but shows how far courts go against one doing the unlawful act. 2. Jones is not entitled to interest, because he did not own a drop of the oil belonging to the owners of the seven-tenths. He is not entitled to the oil, and, of course, is not entitled to the income of interest from its proceeds.

The decree gave the collateral heirs of Dr. Weirich, husband of Laura Weirich, shares in the amount charged to Jones for the oil. I think this was error. Laura Weirich was a child of David Hickman, outliving her father, dying childless, leaving her husband, to whom by her will she gave all her interest in the estate of her father, "both as legatee and residuary distributee under his last will." The will of her father gave her a legacy of six hundred dollars and some silverware. By clause 14 he provided that his real estate not before disposed of (and this land had been given to Mrs. Williamson for life with remainder to her sisters) be sold, and out of it and his personalty his debts paid and the bequests he made, and the residue divided equally among his daughters, among them Laura Weirich. The will of Laura Weirich would give her husband her legacy of six hundred dollars and the silverware, and her ⁵⁸⁷ share in the residue arising from the sale of land and personalty, as the words, "both as legatee and residuary distributee," would in their legal import imply. They are subjects fitting those words in their legal meaning. She gave, too, "subject to certain devises and bequests hereinafter to be made," but made bequests—no devises—but used improperly the word "devise" in making bequests, tending to show still further that she had her mind on personalty, not realty. Her will gave nothing in this land. Hence her husband got no interest in this land, and she died intestate as to it; and as she died before the Code of 1868, and under the reign of clause 3 of section 1 of chapter 123 of the Code of 1860, it would go to her sisters, the plaintiffs, not to the husband, under clause 2 of section 1 of chapter 78 of the Code of 1868. And, besides, she died under the Code of 1860, and chapter 122, section 3, allowed a married woman to make will only of her separate estate; and this was not separate estate, because it vested in her before our first separate estate act: Code 1868, sec. 66.

As to the alleged error in not decreeing that the purchase money under the judicial sale, paid by the purchaser, be refunded to the purchaser, that was not cognizable in this case, but by some proceeding or step in the case in which the sale was had, or other independent proceeding, whatever it may be.

This decision may be burdensome to Jones, who appears to be a man of great energy, business capacity, and merit, and I will not conceal the wish that we could, consistently with law, be more favorable to him; but we are bound by the law, seemingly very plain, and in itself logical and well established. The plain and simple showing of the voluminous record and contestation in this case is that he has taken sole and exclusive possession of land belonging in greater fraction to others, and of his own accord drawn from it vast quantities of oil belonging to them in clear law, and sold it, and reaped rich return, and the true owners demand their own under the law. If he was mistaken in his own judgment as to the title, or from misadvice, it is a misfortune that is to be regretted, but for which the plaintiffs are not legally responsible; and if he knew of the defect of title, and he surely had enough to warn him and put him upon inquiry before embarking in ⁵⁸⁸ large expenditures, it seems only rashness, or rash speculation. In fact, however, the returns bored the wells after the first.

I have said so much only in consideration of the pecuniary magnitude of the case, and in deference to the elaboration, in the oral arguments and briefs of distinguished counsel, of the points involved in the case, which do not seem to me to be very difficult of solution, up to this point. As stated above, the charge against Jones is to be by rents and profits, not by annual rentals; but this presents a question which has given me great perplexity, and this is the question, What shall be credited to Jones against rents and profits?—especially whether he shall be repaid expense of boring wells. Where one man, in possession under a hostile defective claim or title, makes permanent improvements, the common law gave him no pay for them, as he voluntarily put them upon the land of another; but our code, chapter 91, gives compensation therefor if, when the improvements are made, there is “reason to believe the title good under which he or they were holding.” As shown above, warning was given Jones by Tennant, his agent, and by the record under which he purchased, of the rights of the plaintiffs, and our court has held that this notice precludes allowance for improvements: *Hall v. Hall*, 30 W. Va. 779; *Dawson v. Grow*, 29 W. Va. 333; *Cain v. Cox*, 23 W. Va. 613; 29 W. Va. 258. Good faith would seem to be the test, but these cases affect Jones, legally speaking, with a notice repelling good faith; and yet there is good ground for saying that, as a matter of fact, Jones, from misadvice as to the law, thought he was buying a good title. People

generally think that a court sale always gives good title, whereas often it does not. Therefore, viewing Jones as an adverse claimant, or as one who, being really a tenant in common, yet takes sole possession, denying the claim of all others and claiming the entirety, and taking exclusively all rents and profits, it is difficult to accord him compensation consistently with dry law. Even where one joint tenant or tenant in common, not claiming the whole—not denying his fellow's right—makes permanent improvements, without his fellow's consent, he cannot charge him, nor hold exclusive possession until reimbursed ⁵⁸⁹ by rents and profits: *Ward v. Ward*, 40 W. Va. 611; 52 Am. St. Rep. 911; *Freeman on Cotenancy*, sec. 262. In *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353, and note, it was held that "a joint tenant or tenant in common may not erect buildings or make improvements without the consent of his cotenants, and then claim to hold until reimbursed a proportion of the moneys expended. Nor will it alter the case that the cotenant knew that the buildings were being erected, and made no objection." The opinion there says: "There are, however, cases in which an owner standing by, and permitting another to expend money in improving, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement; but in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the one party acts ignorantly, and without the means of better information, and the other remains silent when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But, on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril. In the case before us, there is no evidence that the plaintiff, in any respect, encouraged or connived at the erection of these buildings. Nor was the plaintiff bound to notify Blair of his right in the land, or of his dissent to the erection of the buildings. Blair was well acquainted with the title of the respective parties, and if he was not he was bound to inquire into the title before he undertook to appropriate the lot. It was a matter of record, accessible to all."

It is difficult to ignore the force of that argumentation in this case. In fact, if we turn to the case of *Foster v. Weaver*, 118 Pa. St. 42, 4 Am. St. Rep. 573, and the principles stated in it, we could, with some plausibility, deny any ⁵⁹⁰ cost of production at all. That case held that one tenant in common, tortiously deprived by fraud of his cotenant of his interest in an oil lease, is entitled, in a suit brought for his share of the oil produced and converted by the cotenant, to recover as damages the value of the oil in the tank without deducting for expenses of production. The test there made as to such allowance is whether the party acted under honest mistake of good right, or otherwise; and seeing that our cases of *Hall v. Hall*, 30 W. Va. 779, and *Dawson v. Grow*, 29 W. Va. 333, upon the record of the case in which Jones purchased, and other circumstances, would affect him with notice and deny him improvements, I repeat that there would be plausibility for denying any cost of production. The thought occurred to me that the record charged Jones with only constructive notice, not actual notice, and perhaps actual notice was necessary; but *Hall v. Hall*, 30 W. Va. 779, *Dawson v. Grow*, 29 W. Va. 333, and *Cain v. Cox*, 23 W. Va. 613, 29 W. Va. 258, reject this thought; also, 10 Am. & Eng. Ency. of Law, 247. *Effinger v. Hall*, 81 Va. 94, holds constructive notice tantamount to actual notice, but holds that purchasers at judicial sales may well presume everything rightly done, but that purchasers in pais must examine the chain of title. This exception as to judicial sales, I doubt; our case of *Hall v. Hall*, 30 W. Va. 779, is contra. The very record of the case in which the sale was made and Hickman's will spoke the rights of plaintiffs. If a man's deed tells him of another's right, why may we not say so when the record giving him title tells him of it? To say otherwise is to say a purchaser at a court sale may shut his eyes to the contents of the record which would notify him of another's right, make improvements, and then take away that other's rights, though by the sale he derived no title to such other's rights; the suit thus operating to do indirectly what it does not do directly. If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him: Opinion in *Hall v. Hall*, 30 W. Va. 785; *Harner v. Price*, 17 W. Va. 523; 10 Am. & Eng. Ency. of Law, 248, note.

But there are other considerations. We are in a court ⁵⁹¹ of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflexible, iron-clad rule in equity in this matter,

unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, without which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements: Freeman on Cotenancy, sec. 262; Code, c. 91, sec. 2; Moore v. Ligon, 30 W. Va. 155; White v. Stuart, 76 Va. 566; Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 649; Fishack v. Ball, 34 W. Va. 644. This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruit of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They come into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the planting. I repeat that no immovable rule binds a court of equity in this matter. Freeman on Cotenancy and Partition, section 279, says: "Improvements made by one cotenant, independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account; but under what circumstances, and to what extent, improvements may be considered in taking an account between cotenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of a usual character and necessary for the ordinary and conceded use ⁵⁰² of the property." There is a difference between the case where the party making improvements seeks, as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements: See opinion in Effinger v. Hall, 81 Va. 103; 3 Pomeroy's Equity Jurisprudence, sec. 1241. There is some authority that where one has in good faith

put improvements on land he may, by a suit of his own, charge the land: *Bright v. Boyd*, 1 Story, 478 (Fed. Cas. No. 1875). But unless there was an agreement or circumstances tantamount, or fraud, I would doubt this. Clearly, a consent to such improvement binds the party, and creates a lien on the land and a personal obligation: *Houston v. McCluney*, 8 W. Va. 135. (It is proper to remark that defendants claiming improvements under chapter 91 of the code may recover beyond rents and profits, if in good faith claimants). I repeat that this suit is to charge Jones with rents and profits, and it is not inconsistent to allow him as a setoff expenses of production, including, not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of Jones he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiff's large returns. If we give Jones his expenditures, still a large amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that "by the natural law it is not right that anyone should grow rich by the detriment and injury of another." Much authority can be shown to support this doctrine in addition to that given above: *Story's Equity Jurisprudence*, sec. 1236, note; *Corcoran v. Corcoran*, 119 Ind. 138; 12 Am. St. Rep. 390; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949; 11 Am. & Eng. Ency. of Law, 1107. But for Jones' acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be blind to the ⁵⁹³ argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We cannot be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by setoff all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus.

In conclusion, I must not omit to say that our holding in allowing cost of wells is fortified by the precedent of *Ruffners v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513, where parties, holding

adversely to the plaintiff, were treated as tenants in common with them, and as they had bored wells, and discovered and produced salt water, were allowed improvements, including cost of wells, as setoffs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profit must share the burden." True, in that case the court found that the parties acted under fair belief of good title, so that their good faith could not be doubted. Here, under cases above cited, we cannot find that Jones is unaffected by notice of the plaintiffs' right; but for which I should not, for a moment, entertain any hesitancy in allowing him cost of wells. I have above treated the wells as if permanent improvements. Perhaps they are not to be so treated, but rather as a part of the cost of production, like a tank for keeping the oil when produced. An allowable improvement must be that which adds to—enhances the value of—the land permanently for general uses; but a well or derrick adds nothing permanently, at least for general use, and usable only for producing oil—the mere means or instrument of production. If this be so, there is less question about allowing their cost as but an item in the cost of production, though I have discussed the subject under the law relating to improvements. Treating cost of productive wells as cost of production of oil, we may say that, though Jones had notice of plaintiffs' right, yet he should be charged with net rents ⁵⁹⁴ and profits, not gross—with what he actually received—otherwise equity inflicts a penalty. As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its costs. I confess that, under our statute and decisions, I have hesitancy in this holding; but other members of the court do not, and feeling that Jones, under the circumstances, has strong claims to such allowance, I concur with other members in so holding. But the law ought to be clearly and accurately understood in so important a matter, and I want to state for myself what I understand to be the law, under our statute and decisions. An ejected defendant, who made permanent improvements valuable to the estate, not when he merely believed his title good, but when there was reason to believe it good, may, by filing his claims under section 32, chapter 90, and section 1, chapter 91, of the code of 1891, not only set off the value of such improvements against rents and profits, but recover any balance by which their value may exceed rents and profits; but if, when

the improvements were made, there was not reason to believe the title good, he cannot even set them off against rents and profits; and notice, either actual or constructive, of the defect of the improver's title and of the rights of others will preclude allowance for such improvements. He is precluded because he acts in bad faith or negligence, and cannot take away even the rents and profits of another by improvements the latter did not sanction, which by the common law became part of the land and belonged to the true owner, no matter how they came there, and which the statute allowed only to one legally without blame. The wrongdoer is not given the benefit of his wrong.

Reversed and remanded.

REAL PROPERTY.—PETROLEUM OIL is a mineral and, as such, is a part of the realty: *Marshall v. Mellon*, 179 Pa. St. 371; 57 Am. St. Rep. 601. See *Kelley v. Ohio Oil Co.*, 57 Ohio St. 721; 63 Am. St. Rep. 721.

ESTATES.—A TENANT FOR LIFE is a trustee for those in remainder: *Smith v. Daniel*, 2 McCord Eq. 143; 16 Am. Dec. 641; and must not permanently impair their estate by any wrongful act: See monographic note to *Allen v. De Groodt*, 14 Am. St. Rep. 629, on reversioners and remaindermen. Compare *Jordan v. Benwood*, 42 W. Va. 312; 57 Am. St. Rep. 859.

PERSONAL PROPERTY—MINING FOR OIL—LIFE TENANT.—MINERALS SEVERED from the soil become personalty: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368. A tenant for life of land, upon which there has never been any oil or gas operations previous to the time that the life estate accrued, has no right to operate thereon for oil or gas himself; but he may lawfully mine, sever, and convert the mineral from land into personalty, if the mines were open when the tenancy for life was created: *Marshall v. Mellon*, 179 Pa. St. 371; 57 Am. St. Rep. 601. Compare *Kelley v. Ohio Oil Co.*, 57 Ohio St. 721; 63 Am. St. Rep. 721.

ESTOPPEL—SILENCE—MARRIED WOMEN—INFANTS.—Silence, unless fraudulent, will not estop a person from asserting title to land: *Maple v. Kussart*, 53 Pa. St. 349; 91 Am. Dec. 214; *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115; *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307; *Shakman v. United States Credit System Co.*, 92 Wis. 366; 53 Am. St. Rep. 920, and note. Silence does not create an estoppel, unless there is a duty to speak: *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822. Mere silence on the part of the owner of land will not be sufficient in equity to relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully insists on expending money in the improvement thereof: *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353; but one who stands by, without making known his claim, and suffers another to purchase and spend money on his land, under an erroneous opinion of title, cannot assert his legal right against such person: *Notes to Hafter v. Strange*, 7 Am. St. Rep. 662; *Crest v. Jack*, 27 Am. Dec. 355; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340. Compare note to *Guffey v. O'Reiley*, 57 Am. Rep. 429-433. Married women are not estopped from asserting title to their lands, except for fraud: *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401; 49 Am. St. Rep. 303. The neglect of an infant to assert title to his property, when it is being sold by another, does not prejudice his right: *Norris v. Wait*, 2 Rich. 148; 44 Am. Dec. 283, and note;

but he is estopped by his actual and positive fraud: *Barham v. Turbeville*, 1 Swan, 437; 57 Am. Dec. 782.

NOTICE—JUDICIAL SALES.—A purchaser of land must take notice of his title as being a life estate or a fee, when that title is disclosed by the records: *Stewart v. Matheny*, 66 Miss. 21; 14 Am. St. Rep. 538. The purchaser at a judicial sale is charged with notice of the condition of the title: *Nye v. Fahrenholz*, 49 Neb. 276; 59 Am. St. Rep. 540. He buys at his peril, and is bound to satisfy himself of the authority under which the sale is made: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560.

PARTIES—RESIDUARY ESTATE.—In a suit relating to a residuary estate, all persons interested in the residue must be made parties: *Read v. Patterson*, 44 N. J. L. 211; 6 Am. St. Rep. 877.

IMPROVEMENTS ON ANOTHER'S LAND—COMPENSATION FOR—LIFE TENANT—COTENANT.—Improvements placed by a stranger upon the land of another become the latter's property: *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353; without reimbursement from him: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486; but the equity of one who has made lasting and permanent improvements upon land, under the belief that it was his, but which turned out to be another's, is strong, and compensation therefor has been allowed: See note to *Pitt v. Moore*, 6 Am. St. Rep. 495. A tenant for life cannot charge either the remainderman or the estate for improvements on the land in which he holds the life estate: Note to *Sparks v. Ball*, 34 Am. St. Rep. 239. If one purchases a life estate and erects permanent improvements, he cannot charge the remainderman with their value upon the termination of the life estate; and the fact that a remainderman stood by and permitted improvements to be made by the tenant for life without giving notice of his claim does not estop him from claiming such improvements upon the termination of the life estate: *Stewart v. Matheny*, 66 Miss. 21; 14 Am. St. Rep. 538. An occupying tenant cannot recover of his cotenants compensation for improvements placed by him on the common property: Note to *West v. Weyer*, 15 Am. St. Rep. 555.

RENTS AND PROFITS—ACCOUNT FOR—COTENANT—IMPROVEMENTS.—One in possession of land under an honest, though mistaken, claim of title must account for all the rents and profits received by him while so in possession: *Rabb v. Patterson*, 42 S. C. 528; 46 Am. St. Rep. 743. The rules of accounting, between cotenants, for rents and profits, where one has made improvements on the common property, are discussed in the extended note to *Ward v. Ward*, 52 Am. St. Rep. 924-941. If profits result from property in which there is an estate in reversion or remainder, and also an estate in possession, they follow the right of possession: Note to *Allen v. De Groodt*, 14 Am. St. Rep. 633.

WASTE MAY BE ENJOINED: *Smith v. City Council*, 19 Ga. 89; 63 Am. Dec. 298; note to *Shipley v. Ritter*, 61 Am. Dec. 375; and a tenant for life is liable to account for waste: *Johnson v. Johnson*, 2 Hill Eq. 277; 20 Am. Dec. 72.

SNYDER v. WHEELING ELECTRICAL COMPANY.

[43 WEST VIRGINIA, 661.]

NEGLIGENCE—PLEADING—WHAT SHOULD BE STATED.—A declaration for negligence should state the main or primary facts, without particularly detailing all the evidential facts of negligence. The pleader may say that the defendant negligently did, or did not, do so and so, but he must state the facts which constitute the basis of liability.

NEGLIGENCE—PLEADING—WHAT NEED NOT BE STATED.—While it is not, as a general rule, necessary, in a declaration for negligence, to state the particular acts which constitute negligence, yet detail must be given, if negligence cannot be otherwise charged.

NEGLIGENCE—PLEADING—PROOF.—When the necessary primary facts are given in a declaration for negligence, all other facts which are merely incidental to, and evidence of, such primary facts may be proved though they are not pleaded.

ELECTRIC LIGHT COMPANIES—PLEADING—ALLEGATION BY IMPLICATION.—A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. Thus, if a declaration against an electrical company, for negligence, after alleging the duty of the company to attend to broken wires, contains an averment that a wire was insecurely fastened, came down, and that the current entered one's body, and he fell, and continued to receive it, the declaration may, by implication, be construed to say what it should have positively averred, namely, that the defendant failed to cut off the current from the wire when down.

ELECTRIC LIGHT COMPANIES—NEGLIGENCE—PLEADING—EVIDENCE—VARIANCE.—Under a declaration for negligence, it is only those acts of negligence which have been specified that can be proved. Thus, if a particular act, such as the insecure fastening of an electric wire, is alleged as the cause of the damage, no evidence of other acts causing it can be given, such as bad insulation, or an entire want of insulation, the contact of wires with wet posts, or the failure of duty to attend to broken wires, etc.

INSTRUCTIONS—ERRONEOUS, IF NOT WARRANTED BY PLEADINGS.—An instruction for the plaintiff, though made relevant by some evidence, is bad if there is no warrant for it under the declaration.

INSTRUCTIONS—GOOD AND BAD.—A good instruction does not cure a bad one, but it must be withdrawn.

INSTRUCTIONS.—INCONSISTENCY in instructions is error.

NEGLIGENCE—PRIMA FACIE CASE.—There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

ELECTRIC LIGHT COMPANIES—NEGLIGENCE—PRIMA FACIE CASE.—A high, if not the highest, degree of care is exacted of operators of electricity, and, if a wire, charged with a deadly current of electricity, falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a

man lawfully passing along the highway, kills him with its current, the law raises a *prima facie* case of negligence. This presumption, however, is by no means final or conclusive, but may, in the absence of specific neglect connected with the incident, be repelled by evidence of a uniformly careful, prudent management, commensurate with the dangerous character of the wire, and adequate to the safety of the public.

ELECTRIC LIGHT COMPANIES — NEGLIGENCE — INSTRUCTIONS.—If a *prima facie* case of negligence against an electrical company is made out, instructions which ignore it are properly refused, but instructions leaving it to the jury to say whether the injury was caused by unavoidable accident are improperly refused if the circumstances point to that as the cause.

ELECTRIC LIGHT COMPANIES—DUTY AS TO WIRES.—An electrical company in erecting and maintaining its wires, is only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business.

W. P. Hubbard, for the plaintiff in error.

John A. Howard and Melville D. Post, for the defendant in error.

³⁶² BRANNON, J. In an action on the case, Florence Snyder, administratrix of Andrew C. Snyder, recovered a judgment against the Wheeling Electrical Company for one thousand dollars, and the company obtained this writ of error.

One error alleged is the action of the circuit court in overruling a demurrer to the declaration. The specification of its defect is, that it ought to, but does not, set forth the duty and aver the neglect; and citation is made of the language in the opinion in *Clarke v. Ohio River R. R. Co.*, 39 W. Va. 732, that a declaration in "tort must have requisite definiteness to inform the defendant of the nature of the cause of action, and the particular act or omission constituting the tort," and reference is made to ⁶⁰³ *Poling v. Ohio River R. R. Co.*, 38 W. Va. 645, holding that a declaration for negligence "is good if it contain the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given." I think these statements are good law. Hogg's Pleading and Forms, section 140, says that it is settled as a general rule that it is not necessary to state the particular acts which constitute negligence. This is so, but we must take care not to misapply this statement. The West Virginia cases cited to sustain the rule are cases against

railroads for killing stock. If a declaration allege that a railroad killed stock by negligently running a train over it, as in those cases, that would be sufficient, without more details of the circumstances of running over it; but I take it that it would not be enough simply to say that the company negligently killed a horse. You must aver the duty, and aver the existence or presence of negligence in its performance, and specify the act working damage, but need not detail all the evidential facts of negligence. You must tell the defendant, even under this general rule, that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere negligence, but you must state the acts that are the basis of liability. If the negligence can not be otherwise charged, detail must be given. As said in *Berns v. Gaston etc. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304, the object of a declaration is to give the facts constituting the cause of action, so they may be understood by the party who is to answer them, and by the jury and court, who are to give verdict and judgment on them; and though, in an action for negligence, it is not necessary to state with particularity the acts of omission or commission, yet, lest too loose a practice shall grow under this rule, it may be well to state the warning given in *Baltimore etc. R. R. Co. v. Whittington*, 30 Gratt. 810, that "this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof." In that case it was held not enough to state that the railroad company was working its road with cars and conducted itself so negligently in its business that it inflicted ⁶⁰⁴ severe bodily injuries, by reason of which the person died, without stating where the deceased was, or how injured. To avoid misunderstanding, it is important to add that the declaration need not state the particular facts that are not primary or main facts, but only are evidence of primary facts. When the necessary primary facts are given, then all other facts merely incidental that go to prove the primary facts may be proven without specification in the declaration: *Davis v. Guarnieri*, 45 Ohio St. 470; 4 Am. St. Rep. 548; *Ware v. Gay*, 11 Pick. 106; *McCauley v. Davidson*, 10 Minn. 418, 422.

The declaration in this case states that the defendant operated an electric plant for the manufacture and sale of electricity, and had its wires over the streets of the city of Wheeling for the conveyance of electricity in dangerous currents, and that it was the duty of the defendant to exercise all possible care in putting

up and operating its plant and wires, and constantly inspecting the wires and other appurtenances and appliances, and in seeing that they were strong, suitable, and safe, and that the wires and appurtenances were at all times safely secured, and to immediately attend to and repair broken or defective wires and appliances, and, when any of the wires were down upon the street, to cut off from them the current of electricity, that the lives and limbs of persons on the streets might not be endangered; yet the defendant carelessly and negligently suffered one of its wires at the corner of Market and Sixteenth streets to be so insufficiently secured that it came down, and lay on the street, and Snyder stepped upon it, received the electric current, fell prostrated by it, and continued to lie there, and receive the current into his body, and therefrom died. This declaration surely says that it was the duty of the defendant to safely secure the wires, and that, from being insufficiently secured, they came down into the street, and there wrought the injury. This one duty, breach, and injury saved the declaration from demurrer. I think, too, the declaration may, by implication, be construed to say, what it should have positively averred, that the defendant failed to cut off the current from the wire when down, as it avers that the current entered Snyder's body, and he fell, and continued to receive it, which could not be so had the current been cut ~~666~~ off. "A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment": Hogg's Pleading and Forms, sec. 140. Those were the only two omissions of duty specified. None other could be proven, for, even where there may be allowable a general charge of negligence; yet, if the declaration does give certain specifications of negligence as sources of the injury, others cannot be proven: *Hawker v. Baltimore etc. R. R. Co.*, 15 W. Va. 629; 36 Am. Rep. 825. Therefore, evidence was not admissible to prove want of or bad insulation of wires at the place of accident and elsewhere, and that wires came in contact with wet posts, and that nobody was kept on duty to repair broken wires; that on a certain other occasion, when a wire was out of fix, some one telephoned from the plant that there was no one to fix the wires; that no instruments were kept to discover breaks; and that at other places the wires were bare. It might seem that some of this evidence might come in under the allegation of insecure fastening, but it relates more to the condition of the wires, not to their fastening, and there is no allegation of defective wires.

The declaration does assign certain duties as imposed on the company, among them the duty to attend to broken wires, and to inspect wires and apparatus, and to see that all wires were strong, suitable, and safe; and, if this recital of duties had been followed up with averment that the insulation of the wires was defective, and in places the wires bare, coming in contact with wet poles, thus injuring and rendering them unsafe and liable to break, or even the general allegation that the wires were unsuitable, weak, and unsafe, in negation of the duty assigned in the recital, and that servants were not kept for inspection, and that careful repair was not made, and that no appliances were kept to announce at the plant a fall of wires, and no means existed for discovery of their fall, this evidence would have been admissible. But what, in this declaration, gave the defendant warning of all this evidence? I think evidence of failure to inspect was admissible as evidence of insecurity of fastening and on principles above stated. It may be said that the evidence that no instrument was kept to tell of a fallen wire ought to come in under the allegation that it was the duty to cut off the current, and ⁶⁶⁶ that the current continued to flow after the fall of the wire; but that would be going very far. None of this evidence could get in under this declaration but by a liberality too loose—one ignoring the defendant's rights—some of it not at all. I here allow the evidence that with certain means of ascertaining an accident the current could be shut off at once, under the charge that it was the duty to shut it off, and the allegation made by implication that it continued after the fall of the wire; and that is going pretty far. All this evidence, as a court can readily see, was calculated to and did wield a potent effect in the case, and the error of its admission cannot be looked over as harmless. It was an important factor in the trial.

From these considerations it comes that plaintiff's instruction No. 2 was bad as presenting a theory for recovery which, though made relevant by some evidence, yet there was no warrant for under the declaration. It said that if the defendant failed to have the most reliable and best appliances to discover broken wires, the company, in the absence of contributory negligence, was liable. I think No. 3 good under the charge of insecure fastening. I think No. 2 should have said "good, reliable, and efficient" means and appliances, instead of "best and most reliable": *Berns v. Gaston etc. Coal Co.*, 27 W. Va. 286, points 9, 10; 55 Am. Rep. 304. An instruction for defendants (No. 4) told the jury that the only negligence charged in the declaration

was in suffering wires to be so insufficiently secured as to fall, and therefore all evidence and argument as to other suggestions of negligence must be disregarded; yet plaintiff's instructions held the company liable for not only that, but for failure to have the best appliances for discovery of broken wires, and for failure to exercise the highest degree of care in the construction, inspection, and repair of wires and poles; and so the instructions were inconsistent—one saying to the jury that the case involved only one basis of recovery, others giving several. Which would the jury follow? Likely those giving several. A good instruction does not cure a bad one, but it must be withdrawn: *McKelvey v. Chesapeake etc. Ry. Co.*, 35 W. Va. 500. Inconsistency in instructions is error: *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

I think, as Dr. Walden had examined the dead body ⁶⁶⁷ of Snyder in his effort to resuscitate life, he could give his opinion as to the cause of his death. His opinion, however, should be confined to his knowledge based on that examination; but the court allowed him to state his opinion, not only on that, but also from what he could learn—that is, hearsay. I think it is admissible to ask him whether there was any indication of death from any other cause than electricity, so as to negative any other death-producing cause.

I come next to an important question. Suppose there is no evidence of negligence on the part of the defendant, does the mere fact that the wire fell create a *prima facie* presumption of negligence, sufficient, in the absence of something appearing in the case to repel that presumption, to support the action? This involves the rule or principle of *res ipsa loquitur*—the thing itself speaks. A wire charged with a deadly current of electricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case or facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and prudence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, from inevitable accident? I answer that the law raises a *prima facie* case of negligence. As stated in that great work, 16 *American and English Encyclopedia of Law*, page 448: "As a rule, negligence is not presumed. But there are cases where the maxim, '*Res ipsa lo-*

quitur,' is directly applicable, and from the thing done or omitted negligence or care is presumed." The rule cannot be better stated, in its generality, than as given in *Scott v. Dock Co.* (1865), 3 Hurl. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In those words it is approved in 1895 in *Shafer* ⁶⁶⁸ v. *Lacock*, 168 Pa. St. 497, a case where two workmen were repairing a roof, having a fire pot, and from it a fire resulted, destroying the house. "Where the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence in conformity with the maxim, '*Res ipsa loquitur*,'" is the apt language in which the principle is stated in *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75. One man is hurt from the works or property of another, when, from the nature of the case, he would not likely have been hurt without negligence of that other. May he not ask of that other an explanation, or, on his failure to give it, then damages for his injury? Take the case where one, in passing along a street, is hurt by a barrel falling from a door above, or by a brick falling from a wall or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence. Especially take the cases where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requiring the highest degree and constancy of care, and one is killed from its being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears? The latest work on Torts (2 Jaggard on Torts, 864) says: "A live wire, however, is exceedingly dangerous, so that proof of contact therewith, and consequent damages, makes it a complete case of *prima facie* negligence, and throws the burden on the defendant to show that such wire was in the street without fault on his part. Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge in the construction, inspection, and repair of their wires and poles, and in the use of devices to guard against harm." This doctrine needs no

further discussion from me. It is well sustained by American and English authority: 16 Am. & Eng. Ency. of Law, 449, and notes; 2 Jaggard on Torts, 938; Wharton on Negligence, sec. 421; Cooley on Torts, 799; Bigelow on Torts, 596; Sherman and Redfield on Negligence, sec. 60; Mullen v. St. John, 15 Am. Rep. 530 (a building falling into street); Mulcairns v. Janesville, 67 Wis. 24 (wall of a cistern falling); Dixon v. ⁶⁶⁹ Pluns, 98 Cal. 384; 35 Am. St. Rep. 180 (chisel falling from a scaffold); Houston v. Brush, 66 Vt. 331 (injury from being struck by a wheel from a tackle block, attached to a derrick); note to Philadelphia etc. R. R. Co. v. Anderson, 72 Md. 519; 20 Am. St. Rep. 493; Thomas v. Telegraph Co., 100 Mass. 156 (telegraph wire swinging over a street too low, so as to obstruct travel); Clare v. National City Bank, 1 Sweeny, 539 (injury from plank falling from one's premises); Howser v. Cumberland etc. R. R. Co., 80 Md. 146; 45 Am. St. Rep. 332 (cross-tie falling from a moving car); Uggla v. West End etc. Ry. Co., 160 Mass. 351; 39 Am. St. Rep. 481; Morris v. Strobel etc. Co., 81 Hun, 1 (signboard falling in street). It is clear that this doctrine applies in cases where a passenger on a railroad, or other conveyance of a common carrier, is injured, there existing in such cases a presumption of negligence against the carrier, because there is an implied contract to safely convey; but it is not confined to such cases: Philadelphia etc. R. R. Co. v. Anderson, 20 Am. St. Rep. 493; Rose v. Stephens etc. Transp. Co., 11 Fed. Rep. 438. There it is said that, though the presumption is more frequently applied in such cases, yet there is no foundation in authority or reason for such limitation, as the presumption originates from the nature of the act, not from the relation of the parties, and is indulged whenever, as a legitimate inference, the occurrence is such as, in the ordinary course of things, does not take place when the proper care is exercised. This doctrine has been applied to those using electricity in streets: Western Union Tel. Co. v. State, 82 Md. 293; 51 Am. St. Rep. 464; Haynes v. Raleigh Gas Co., 114 N. C. 203; 41 Am. St. Rep. 786. Public policy, from sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a very high, if not the highest, degree of care, and this high degree would seem all the more reasonable to justify this rule of presumptive negligence in such cases. The degree of care in the nature of the case being high, and there being little danger if such care be exercised, if accident happen, there is afforded a probability of the absence of that care. This high degree of

care is exacted of operators of electricity by the cases just cited, and by Denver etc. Electric Co. v. Simpson, 21 Colo. 371; Giraudi v. Electric Imp. Co., 107 Cal. 120; 48 Am. St. Rep. 114; Ennis v. Gray, 87 Hun, 355. ⁶⁷⁰ Crosswell on Electricity, section 249, says that the mere fact that an electric wire sags or falls, if unexplained, is sufficient proof prima facie of negligence. But juries must understand that this presumption is by no means final or conclusive. Uniformly careful, prudent management commensurate with the dangerous character of the works and adequate to the safety of the public, in the absence of specific neglect connected with the accident, will repel such presumption. We must not forget that misfortunes do occur from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective, and break, when no human skill could detect its defect. Time and wear deteriorate man and all the means and instruments he uses to gain a living. Paralysis and failure may come upon them at any moment. Whether there is culpable blame is a question for a fair-minded jury under all the circumstances.

It follows from what I have said that the court properly refused to exclude the plaintiff's evidence as it tended in an appreciable degree to sustain the case, so as to make it proper to go to a jury. So I may say as to the defense of contributory negligence: Carrico v. West Virginia etc. Ry. Co., 35 W. Va. 389, point 3; Yeager v. Bluefield, 40 W. Va. 484. And the defense waived the motion to exclude by going on with its evidence: Robinson v. Welty, 40 W. Va. 385; Core v. Ohio River R. R. Co., 38 W. Va. 456. And it follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2, that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction given in lieu of it the jury was told that the mere fact of injury raised no presumption of negligence, unless the proof establishing the injury showed circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negated the rule that the fall of the wire and injury afforded a prima facie case of negligence and the instruction was beneficial to the defendant.

Defendant asked instruction 9, saying that, if the wire where the accident occurred was defective, and the injury ⁶⁷¹ resulted from that defect, that raised no presumption of negligence, and the plaintiff could not recover unless he proved by a preponder-

ance of evidence, in addition to these facts, that the defect occurred through the negligent act or default of the defendant. This instruction is bad. Granting a defect in the wire killing the deceased, a prima facie case for recovery is made. Defendant asked and was refused instruction No. 10: "Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence cannot recover without showing enough to exclude the case from that class of accidental occurrences." In *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 412, 2 Am. St. Rep. 193, cited to support the instruction, it is admitted, I think, that in cases where a presumption of negligence arises, the principle of this instruction does not apply. The instruction is bad as applied to this case, in view of the rule above stated of a presumption of negligence from this occurrence. Defendant was refused instruction No. 11: "Where the circumstances of an accident indicate that it may have been unavoidable notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it from which the injury followed in natural sequence." I think this instruction proper, in view of the defendant's evidence as to good management, and evidence by witnesses on both sides that electric wires sometimes break from causes impossible to discover. Of course, though the prima facie presumption of negligence from the broken wire exists, yet it is subject to be met by any and all circumstances, features, and evidence in the case tending to give the misfortune a cause not springing from the company's fault, but purely from an accident, which no reasonable human care could prevent, a hidden defect in the wire, electrolysis rendering it suddenly weak, or whatever cause. This instruction presented the question to the jury on the whole breadth and aspect of the case, whether the misfortune came from unavoidable accident; and it seems to me that, when the circumstances do indicate unavoidable accident as the ⁶⁷² cause, it ought to be shown or appear that it was not. Why was not the defendant entitled to this instruction? I think instruction No. 12 asked by the defendant was improperly refused: *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193. "12. The defendant in erecting and maintaining its wires, was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and

the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." As the case is to be retried, I shall not discuss the merits on the evidence as to the liability or nonliability of the defendant, either with or without reference to contributory negligence, as the evidence may not be the same on a second trial, and, if not, this court ought not to express an opinion on part of the evidence. We will therefore reverse the judgment, grant a new trial, and remand.

NEGLIGENCE—PLEADING.—The probative facts requisite to prove ultimate facts are matters of evidence, and need not be set out in the complaint: *Gude v. Dakota etc. Ins. Co.*, 17 S. Dak. 644; 58 Am. St. Rep. 860. It is the ultimate, and not the probative, facts which should be alleged: *McCaughy v. Schuette*, 117 Cal. 223; 59 Am. St. Rep. 176, and note; *Robinson v. Berkey*, 100 Iowa, 136; 62 Am. St. Rep. 549, and note. A complaint charging negligence in general terms is good upon demurrer: *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; 61 Am. St. Rep. 578, and note; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203; but the plaintiff must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recover: *Note to Madden v. Port Royal etc. Ry. Co.*, 28 Am. St. Rep. 858. An allegation specifying the act the doing of which caused an injury, and averring generally that it was negligently done, states a cause of action, though it is not apparent from the complaint how the injury resulted from the negligence alleged: *Railroad Co. v. Mackey*, 53 Ohio St. 370; 53 Am. St. Rep. 641, and note.

ELECTRIC LIGHT COMPANIES—CARE—NEGLIGENCE.—A company or person using wires to convey electricity is, independently of statutory regulation, required to use very great, if not the highest, degree of care to prevent injury to persons or property: *McKay v. Southern Bell Teleph. Co.*, 111 Ala. 337; 56 Am. St. Rep. 59, and note; *Griffin v. United Electric Light Co.*, 164 Mass. 492; 49 Am. St. Rep. 477; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114.

NEGLIGENCE—ELECTRIC WIRES—PRESUMPTION—PRIMA FACIE CASE.—Negligence is presumed from the happening of an accident, if injury occurs in consequence of something which the defendant did or did not do, and which it was his duty to do, or not to do, and the defendant is required to rebut this presumption: *Note to Mexican Cent. Ry. Co. v. Lauricella*, 47 Am. St. Rep. 107. If the cause of an injury to person or property is shown to be under the management of the defendant, and the accident is such as in the ordinary course of events does not happen if those having the management use proper care, it affords prima facie evidence, in the absence of explanation, that the accident arose from negligence: *Judson v. Glant Powder Co.*, 107 Cal. 549; 48 Am. St. Rep. 146, and note. Proof that there was a live wire carrying a deadly current of electricity down in the public streets raises the presumption that some one failed in his duty to the public: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786.

INSTRUCTIONS—GOOD AND BAD.—A bad instruction is not cured by a good one: *State v. Ardoin*, 49 La. Ann. 1145; 62 Am. St. Rep. 678. Part of an instruction which is correct does not cure that part which is defective: *Chicago etc. R. R. Co. v. Champion*, 9 Ind. App. 510; 53 Am. St. Rep. 357.

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2. **ACTIONS.**—A SINGLE TORT GIVES ONLY ONE CAUSE OF ACTION, and the damages resulting from one and the same must be assessed and recovered in one suit. (*Wheeler Sav. Bank v. Tracey*, 505.)

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2. **ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.**—An owner of the fee, who incloses a railroad right of way with his adjoining land and uses it continuously without the consent of the company, asserts an ownership inconsistent with its rights, and has such an occupancy as ripens into title by adverse possession upon the expiration of the statutory period, although he has a right during such period to use the right of way for any purpose not required for the purposes of the railroad. (*Matthews v. Lake Shore etc. Ry. Co.*, 336.)

3. **ADVERSE POSSESSION—OCCUPANCY BY WIDOW.**—Under a statute providing that a "widow entitled to dower in the lands of which her husband died seised may continue to occupy the same with the children or other heirs of the deceased," so long as the latter do not object, without having dower assigned, a widow who continues to occupy such lands with the minor children without objection by any of the interested parties, after disclaiming under a will giving her a life estate and without an assignment of dower, is not in adverse possession as against a remainderman under the will. (*Lumley v. Haggerty*, 364.)

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AGENCY.

1. AGENCY—AUTHORITY OF GENERAL AGENT.—Especial instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal is bound to the same extent as though such special instructions were not given. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

2. PRINCIPAL AND AGENT.—A wrong done by an agent cannot be justified on the ground that it was directed by his principal. In an action of trover, it is no defense that the defendant acted as the agent or servant of another who was himself a wrongdoer. (*Wing v. Milliken*, 238.)

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2. APPEAL—PRESUMPTION WHERE EVIDENCE IS NOT PRESERVED.—If the evidence is not preserved in the record, either by a bill of exceptions or by a certificate of evidence, it will be presumed that the facts recited in the decree were found upon sufficient evidence. (*Knickerbocker v. McKindley Coal etc. Co.*, 54.)

3. APPELLATE PRACTICE.—The admission of a leading question cannot be reviewed on appeal. (*Trenton etc. Ry. Co. v. Cooper*, 592.)

4. NEW TRIAL.—FINDINGS OF THE LOWER COURT on motion for a new trial as to the force and effect of the testimony are final, and cannot be reviewed on appeal. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

5. APPEAL—REVIEW OF FACTS.—A PEREMPTORY INSTRUCTION to find for the defendant, when asked as one of a series, does not authorize an appellate court to review the facts. (*Hartford Deposit Co. v. Sollitt*, 35.)

6. APPEAL.—HARMLESS ERROR in the admission of evidence is no ground for a reversal of the judgment. (*Rockford City Ry. Co. v. Blake*, 122.)

7. APPELLATE PROCEDURE—ERROR MUST BE SHOWN.—Bills of exception to the admission or rejection of evidence by the trial court must show whether it was material; otherwise the judgment will not be reversed. (*Union etc. Ins. Co. v. Pollard*, 715.)

8. LAW OF ANOTHER STATE.—A FINDING OF A TRIAL COURT respecting the law of another state is a finding upon a question of fact, and hence cannot be revised on appeal, unless there was no evidence to warrant it, or, in other words, unless the statutes and decisions offered in evidence conclusively show, in spite of any possible inferences of facts, or doubts in the interpretation of them, that such finding is wrong. (*Wylie v. Cotter*, 305.)

9. APPELLATE PRACTICE.—FINDINGS OF FACT cannot be disturbed on appeal, unless without testimony to support them, or manifestly against the weight of evidence, although the constitution of the state provides that findings of fact, as well as of law, may be reviewed on appeal. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

10. APPELLATE PRACTICE.—FINDINGS, WHEN NOT DISTURBED.—If the evidence is conflicting, and no instructions are asked or given, the findings of the trial court sitting without a jury are not to be disturbed on appeal. (*Holker v. Hennessey*, 524.)

11. APPELLATE PRACTICE.—JUDGMENT IN EXCESS OF VERDICT.—An objection that the amount of the judgment is in excess of the verdict cannot be raised for the first time on appeal. (*Greenville v. Ormand*, 663.)

12. APPELLATE PRACTICE.—WAIVER OF OBJECTIONS.—An objection that it was not proved that a foreign insurance company had authority to do business within the state, cannot be made for the first time in the appellate court, so as to control the decision. (*Warner v. Delbridge etc. Co.*, 367.)

13. APPELLATE PRACTICE.—WAIVER OF OBJECTIONS.—If an issue is framed, and a case presented upon its merits, an objection to the irregularity of the proceedings cannot be raised for the first time on appeal. (*Safford v. Detroit Board of Health*, 332.)

14. APPEAL.—ALLEGED VARIANCE.—WHEN NOT REVIEWABLE.—An alleged variance between the allegation and proof is not reviewable on appeal as a question of law, unless it is called to the attention of the trial court and a ruling had thereon. (*Chicago etc. Ry. Co. v. Gillson*, 117.)

15. APPELLATE PROCEDURE.—EXCEPTIONS TO INSTRUCTIONS.—A bill of exceptions, which shows that the defendant objected to each and all the instructions given for the plaintiff and to the action of the court in refusing the instructions asked by the defendant and in modifying another instruction, instead of giving it as asked, is sufficient to present the question whether the action of the court was erroneous. (*Moore Lime Co. v. Richardson*, 785.)

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ARBITRATION AND AWARD.

1. ARBITRATION.—UMPIRE, DUTIES OF.—An umpire, or third arbitrator, must pursue the same regular course with respect

to the conduct of the cause as if he were to commence a new cause as arbitrator. He may not take the evidence, or any part of it, from the notes of the other arbitrators, but must examine such witnesses as the parties choose to produce and as to such points as they may choose to raise, although the same witnesses have already been examined upon the same points before the other arbitrators. (Coons v. Coons, 804.)

2. ARBITRATION—UMPIRE, NOTICE AND HEARING BEFORE.—If two arbitrators are unable to agree, and, acting upon a power given them, they select an umpire, or third arbitrator, the parties are entitled to notice of such election and an opportunity to be heard before him, and an award against a party who was neither heard, nor given an opportunity for a hearing, before such umpire, he acting upon a statement of the testimony made by the other arbitrators, is invalid, where there has been no waiver of the right to a hearing. (Coons v. Coons, 804.)

3. ARBITRATION—WAIVER OF RIGHT TO BE HEARD BEFORE AN UMPIRE.—Though a party may waive his right to be heard and to offer evidence before an umpire, his waiver must be established by clear and conclusive evidence. (Coons v. Coons, 804.)

4. ARBITRATION—ESTOPPEL TO RESIST AN AWARD.—The fact that a person against whom an award was made had at first intended to abide by it, and, with that object in view, had the necessary papers prepared, does not estop him from resisting the award on discovering that it was made by an umpire who did not hear any of the evidence, but acted on statements thereof made by the other arbitrators, and did not give the parties any notice of his appointment nor any opportunity to present their cause to him. (Coons v. Coons, 804.)

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1. CRIMINAL LAW—RIGHT TO SEARCH PRISONER.—An arresting officer has a right to search the prisoner. This power exists from the nature and objects of the public duty the officer is required to perform. (Holker v. Hennessey, 524.)

2. CRIMINAL LAW—RIGHT TO TAKE PROPERTY FROM PRISONER.—In the absence of statute, an officer has no right to take any property from the person of the prisoner, except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape, and for these purposes he may search the prisoner, but he holds all property thus taken, whether goods or money, subject to the order of the court. (Holker v. Hennessey, 524.)

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ATTACHMENT.

1. GARNISHMENT—PLEADINGS IN.—Issues in garnishment proceedings are made up by the denial of the answer of the garnishee and the reply thereto. The denial should state the grounds upon which a recovery is claimed, and the reply to the denial makes the issue. (Holker v. Hennessey, 524.)

2. ATTACHMENT—SPLITTING ACTIONS—ESTOPPEL.—An action for a wrongful attachment cannot be maintained against the attaching officer and attaching creditor by one who interpleaded in the attachment suit, setting up a claim to and recovering part of the goods, but not that for which damages are sought, although such officer was not, *eo nomine*, a party to the record in the attachment suit. (*Wheeler Sav. Bank v. Tracey*, 505.)

3. ATTACHMENT—SPLITTING ACTIONS—ESTOPPEL.—An action for a wrongful attachment on mortgaged goods cannot be maintained by an assignee of the mortgage, who interpleaded in the attachment suit, setting up his right to certain accounts included in the levy, on a part of which he recovered, without making any claim to the goods covered by the mortgage. (*Wheeler Sav. Bank v. Tracey*, 505.)

4. ATTACHMENT—INTERVENTION—FAILURE TO ASSERT TITLE.—One suing for a wrongful attachment, who has failed to assert his right to the property in his plea in intervention in the attachment suit, cannot escape the effect of such failure by showing that he had no title thereto at the time, if it appears that he owned and controlled a beneficial interest in the property at that time. In such case, he is estopped to maintain such suit. (*Wheeler Sav. Bank v. Tracey*, 505.)

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BANKS AND BANKING.

1. BANKERS—LIABILITY TO PERSONS MAKING JOINT DEPOSITS.—If persons deposit moneys with a bank in their joint names, with directions that payment shall be made only on their joint checks, the banker has no right to assume that their rights are equal or will remain so, and if he pays the whole to one of them without authority from the other, the latter may recover his interest in the fund at the date of such payment, though in excess of one-half thereof. (*Nelman v. Beacon Trust Co.*, 315.)

2. BANKS AND BANKING—BONA FIDE PURCHASER.—A bank which discounts a note for a customer, crediting the proceeds to his account, is not a bona fide purchaser for value, unless such credit is drawn upon or the account of which it becomes a part is exhausted before the maturity of the note, or before notice of fraud invalidating it. (*Drovers' Nat. Bank v. Blue*, 327.)

3. BANKS AND BANKING—PAYMENT TO FORGER—LIABILITY TO DEPOSITOR.—If a savings bank is organized under a general statute, and the profits of the bank belong to its stockholders and not to depositors, a by-law providing that the bank shall not be liable to a depositor for payment made to a third person who presents a depositor's pass-book, however acquired, does not relieve the bank from liability imposed upon it by such statute to repay all deposits to the depositor, or his legal representatives, in a case where a pass-book is presented by, and a deposit paid to a third person, who has forged the depositor's signature, unless the attention of such depositor has been expressly called to such by-law, and he has actually or impliedly assented thereto. (*Ackenhansen v. People's Savings Bank*, 338.)

4. BANKS AND BANKING—BY-LAWS.—The requirements of a general statute, under which a savings bank is organized, that all deposits shall be paid to the depositor or his legal representatives,

cannot be changed by a by-law adopted by the bank, unless the attention of the depositor is called thereto, and he actually or impliedly assents. (*Ackenhausen v. People's Savings Bank*, 338.)

See Contracts, 1.

BENEFICIAL ASSOCIATIONS.

See Insurance.

BICYCLES.

See Negligence, 15-17.

BIGAMY.

1. BIGAMY—PRESUMPTIONS—PROOF OF MARRIAGE.—If two successive marriages are charged in a prosecution for bigamy, the presumption in favor of the legality of each is equal, and an actual marriage in each case must be proved. (*Lowery v. People*, 50.)

2. BIGAMY—BOTH MARRIAGES—HOW PROVED.—In a prosecution for bigamy, both marriages must be proved, though it is not necessary to prove either by record evidence, such as the register or certificate. In each instance the marriage may be proved by such evidence as is admissible to prove a marriage in other cases. (*Lowery v. People*, 50.)

3. BIGAMY—PROOF OF MARRIAGE—COHABITATION AND REPUTATION—ADMISSIONS.—In a prosecution for bigamy, marriage may be proved by admissions of the defendant of a marriage in fact, especially when supported by evidence of cohabitation and reputation as husband and wife, but evidence simply of cohabitation and reputation as man and wife, without any admission of a marriage in fact, is not proof of marriage. (*Lowery v. People*, 50.)

4. BIGAMY—WITNESSES—COMPETENCY OF SECOND WIFE.—In a prosecution for bigamy, where two successive marriages are charged, it is only in cases where the first marriage is not controverted, or has been established by other evidence, that the second wife is allowed to testify. She is not competent to prove the first marriage, where that is controverted. Hence, she cannot testify as to admissions made by the defendant concerning the existence of the first marriage. (*Lowery v. People*, 50.)

BILL OF EXCEPTIONS.

See Appeal.

BOARDS OF HEALTH.

BOARDS OF HEALTH—POWERS AND LIABILITIES—QUARANTINE.—A statute providing that the board of health of a municipality shall, in case of pestilence or epidemic disease, "take such measures and do, and order, and cause to be done, such acts, for the preservation of the public health, as they may in good faith deem the public safety and health to demand," makes it the duty of such board to award compensation for direct damages growing out of the action of the board in using a hotel for a hospital during an epidemic of smallpox therein, and in destroying infected property, and in causing the burial of smallpox patients. (*Safford v. Detroit Board of Health*, 332.)

See Mandamus.

BONA-FIDE PURCHASER.

See Banks and Banking, 2; Negotiable Instruments, 7, 8, 15.

BROKERS.

BROKERS—RIGHT TO COMMISSION WHERE TWO OR MORE HAVE GIVEN SERVICES.—Where two or more brokers have engaged in bringing about a sale of real property, a recovery of commissions cannot be supported in favor of one of them who does not show that his services were the efficient means of bringing about the actual sale. There cannot be a recovery in favor of both, though both have rendered services meritorious and essential in producing the result, and without which it would not have been accomplished. A discrimination must be made between them to ascertain whose services must be deemed the efficient and effective cause of the sale. (*Whitcomb v. Bacon*, 317.)

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS.—THE RELATION BETWEEN THE MEMBERS of an incorporated building and loan association is not that of partners. Contracts between them and the association constitute loans of money, and are, therefore, subject to the law defining usury. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

2. BUILDING AND LOAN ASSOCIATIONS.—Loans made by a building and loan association to a member thereof are not partnership transactions; and all moneys paid in, whether before or after loans, must be credited by the association on the debt. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

3. BUILDING AND LOAN ASSOCIATIONS.—PROVISIONS IN A BOND given by a member to a building and loan association, stipulating that upon failure to pay monthly installments for ninety days after maturity the whole sum borrowed shall become due with interest, do not authorize the association, upon default, to recover the whole sum borrowed without giving credit for payments made, whether as dues, fines, premiums, or otherwise. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

4. BUILDING AND LOAN ASSOCIATIONS ARE REQUIRED, in determining the amount due under a mortgage from a member who has assigned his shares to such associations, to deduct the amount of dues paid on such shares before, as well as after, the execution of the mortgage. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

5. BUILDING AND LOAN ASSOCIATIONS—CONFLICT OF LAWS.—A contract between a building and loan association organized in one state and a member thereof residing in another state, providing for payment in the former state or to a local treasurer in the latter state, must be treated as a contract to be performed in the former state in determining whether the transaction is usurious. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

6. USURY—BUILDING AND LOAN ASSOCIATIONS.—A transaction by which a building and loan association charges a borrowing member six per cent interest, and also a premium of six per cent, is not usurious, although the highest legal rate is eight per cent; but such association is required to give credit to the borrower for the amount of premiums paid as payment on the principal debt. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

7. BUILDING AND LOAN ASSOCIATIONS—USURY.—A contract or agreement between a borrowing member and a building and loan association by which it loans him one thousand dollars and issues him twenty shares of its stock, and he pledges them and mortgages real property as security and pays into its treasury seventeen dollars

monthly, of which five dollars are for interest, two dollars for an expense fund, and the balance for a loan fund, is usurious, when the rate of interest allowed by law is but six per cent per annum. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

8. BUILDING AND LOAN ASSOCIATIONS—USURY.—If there is no charter specially authorizing the chartering of building and loan associations, and they, are, therefore, incorporated under general laws, contracts usurious when made by other corporations or individuals are none the less usurious when made by such corporations. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

9. BUILDING AND LOAN ASSOCIATIONS—RELIEF FROM A USURIOUS CONTRACT WITH.—Where a borrowing member of a building and loan association enters into an agreement which is deemed usurious, he cannot, on his default in the payments stipulated for, be charged with fines on account of such defaults, nor can he be charged with any interest while in default. He is entitled to have deducted from the amount of his loan the interest and the monthly dues paid by him on his stock in the association. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

10. BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEPRECIATION OF ASSETS—WINDING UP—END OF CONTRACT.—If the affairs of an incorporated building and loan association show that there is a deficiency of assets, that the stock can never be matured, and that the purposes for which it was organized have wholly failed, a court of equity has jurisdiction to wind up the corporation, and such a proceeding puts an end to the contract between it and its members, at least so far as future performance is concerned. (*Knutson v. Northwestern Loan etc. Assn.*, 410.)

11. BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEDICATION OF ASSETS—WINDING UP—ADJUSTMENT—RESCISSION.—In winding up the affairs of an incorporated building and loan association, where the purposes for which it was organized have wholly failed, and there is a depreciation of assets, the court should, in adjusting matters between it and its members, proceed upon the principle of rescission, so far as it can be equitably and justly applied, requiring each member, to this extent, to receive back what he has paid, and to pay back what he has received. (*Knutson v. Northwestern Loan etc. Assn.*, 410.)

12. BUILDING AND LOAN ASSOCIATIONS—FAILURE OF PURPOSE—DEPRECIATION OF ASSETS—WINDING UP—ADJUSTMENT—LOSSES AND EXPENSES—SETOFF.—If the purposes for which an incorporated building and loan association was organized have wholly failed, and a receiver is appointed to wind up the corporation whose assets have become depreciated, it is the duty of each member, whether a borrower or nonborrower, to bear his share of the losses and expenses of the corporation, and also the expenses of winding it up. Hence, a borrowing member is not entitled to set off all that he has paid against an advancement or loan which he has received, but only so much as remains after deducting what the court is fully satisfied will meet his share of the shortage. This deducted amount should be collected from the borrower, and held until final distribution, to be applied, so far as is necessary, toward paying such losses and expenses. (*Knutson v. Northwestern Loan etc. Assn.*, 410.)

13. BUILDING AND LOAN ASSOCIATIONS—WITHDRAWALS—INSOLVENCY.—A by-law of a building and loan association which provides that any stockholder, after giving thirty days' notice, may withdraw the full amount of his payments to the loan

fund, with earnings up to the last dividend period, withdrawals to be paid according to priority of notice, and the association not to be liable to pay out on account of withdrawals during any month more than thirty per cent of the cash receipts of the loan fund for that month, contemplates a going concern, and, in case of the insolvency of the association, the fact of notice of withdrawal given by a shareholder before the appointment of a receiver, but after such thirty per cent has been paid out, does not make his claim a preferred claim, nor give him any priority over other shareholders who have not given notice of withdrawal. (*Rabbitt v. Wilcoxon*, 152.)

14. STATUTES — RETROACTIVE — CONSTRUCTION AS AGAINST.—Courts will not construe a statute so as to give it a retroactive effect, unless there is something on the face of the enactment putting it beyond doubt that such was the purpose of the legislature. Therefore, a statute authorizing building and loan associations by their by-laws to fix the premium or bonus at which they will dispose of money in their treasury does not remove the taint of usury from transactions entered into before its passage. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

BUILDING CONTRACTS.

ARCHITECT—CONTRACT FOR THE EMPLOYMENT OF, WHAT IS NOT.—The publication of a notice to architects to compete for plans for a building proposed to be erected by an association, reserving, however, the right to reject all plans, followed by a rejection of all the plans submitted, but accompanied by a vote of a committee of the association that one of the persons thus submitting plans should be chosen architect, does not constitute a contract between him and the association, where the vote is not formally communicated to him. The committee may, therefore, rescind its vote and employ another architect. (*Benton v. Springfield Y. M. C. Assn.*, 320.)

BURDEN OF PROOF.

See Negotiable Instruments, 7, 17; Usury, 1; Warehousemen, 2; Wills, 7.

BURGLARY.

1. BURGLARY—NAMING BUILDING.—An indictment for burglary must give the name of the building burglarized. (*State v. Dale*, 513.)

2. BURGLARY.—INDICTMENT for burglary drawn under a statute must give the name of the building burglarized in the words employed in the statute, and if to such place the statute adds a descriptive phrase, it must be covered by allegation. (*State v. Dale*, 513.)

3. BURGLARY — RECENT POSSESSION OF STOLEN GOODS—PRESUMPTION.—The recent possession of goods stolen at the time that a burglary was committed, unless rebutted or counterbalanced in some way, is presumptive evidence of the commission of that crime by the possessor, and, although the prosecuting witness will not swear that the goods are his, yet it is sufficient to go to the jury if he swears that they resemble his. (*State v. Dale*, 513.)

4. BURGLARY—CONVICTION, WHEN NOT BAR TO SUBSEQUENT TRIAL.—If a statute under which an indictment for burglary is drawn has two separate clauses, it must clearly appear from the indictment under which clause the accused is prosecuted, otherwise a conviction is not a bar to a subsequent trial. (*State v. Dale*, 513.)

BY-LAWS.

See Insurance, 22, 23.

CARRIERS.

CARRIER'S LIABILITY FOR BAGGAGE—WHEN HAS NOT COMMENCED.—If a person intending to take passage by a steamboat procures a ticket and sends his baggage to the office of the company on a day in advance of that when he is to take passage, and such baggage is left with an agent, who, however, refuses to receipt for it, the owner not being entitled to a check at that time because not presenting his ticket, such baggage is in possession of the carrier in its character as warehouseman, and it is not answerable, therefore, if it takes the usual precautions, though the baggage is lost. (*Murray v. International S. S. Co.*, 290.)

See Elevators, 1; Police Power, 5, 6.

CAVEAT EMPTOR.

See Landlord and Tenant, 2.

CERTIORARI.

TRIAL—CERTIORARI—OBJECTIONS AVAILABLE UPON.—If, after the disagreement and discharge of a jury in an action before a justice of the peace, the parties submit the case to the justice upon the proofs already taken stipulating that all questions shall be saved to the parties, an objection to the exclusion of evidence is available on certiorari. (*Drovers' Nat. Bank v. Blue*, 327.)

CHAMPERTY.

CONTRACTS AGAINST PUBLIC POLICY—CHAMPERTY. A contract under which a person who is a stranger to both parties to a disputed claim for damages agrees with the claimant to undertake to hire an attorney, and prosecute a suit for the collection of the claim, entirely at his own cost and expense, for one-half of what he may collect on it, and the claimant agrees not to settle the claim without the written consent of the other party to the contract, and that if he does so settle he shall pay to such other party a fixed and arbitrary sum, regardless of the amount or value of the services rendered by the latter, is void, as against public policy and champertous. (*Huber v. Johnson*, 456.)

CHARITIES.

1. CHARITABLE USE—BEQUEST TO—WHEN NOT SUFFICIENTLY CERTAIN.—A devise or bequest to two designated persons, or the survivor of them, or to whomsoever they may select in case of their death, in trust for the benefit of the New Jerusalem Church (Swedenborgian), as they shall deem best, is an attempt to create so vague and uncertain a trust that it cannot be enforced by a court of equity. The testator must, therefore, be deemed to have died intestate as to the property which he thus attempted to dispose of. (*Fifield v. Van Wyck*, 745.)

2. CHARITABLE USES AND TRUSTS—CORPORATION—WHEN NOT A BENEFICIARY.—A devise to trustees in trust for the benefit of the New Jerusalem Church, as they shall deem best, does not show that the church named was intended to be either the beneficiary or the agency by which the trust was to be administered, and there being nothing by which a court of equity can control the discretion of the trustees or ascertain whether they have committed a breach of the trust, it cannot be sustained. (*Fifield v. Van Wyck*, 745.)

CHATTEL MORTGAGES.

1. MORTGAGE OF CHATTELS—DATE AS A PART OF THE DESCRIPTION OF THE PROPERTY.—If a mortgage is dated and purports to include all the articles, fixtures, and merchandise in a designated building, the date must be accepted as a part of the description. Hence the mortgage cannot include property not in the building at that date, though therein at the time when the mortgage was in fact executed and delivered. (*Snow v. Ulmer*, 237.)

2. CHATTEL MORTGAGE—WHEN VOID ON ITS FACE.—A chattel mortgage covering a stock of liquors and cigars is fraudulent and void on its face, as to creditors of the mortgagor, where it provides that he may sell and apply the proceeds toward keeping up the stock and paying expenses, and that any surplus is to be applied on the mortgage indebtedness. (*Pabst Brewing Co. v. Butchart*, 408.)

3. A MORTGAGE OF CHATTELS AUTHORIZING THE MORTGAGOR to sell portions of the property mortgaged, and with the proceeds to purchase other goods of a like kind, which shall be subject to the mortgage, does not authorize him to sell to other creditors in payment of his past debts, and, if he does turn over the mortgaged property or any part thereof to them in such payment, they are liable to the mortgagee for the conversion of the property so taken by them. (*Dexter v. Curtis*, 266.)

4. MORTGAGE OF CHATTELS—AFTER-ACQUIRED PROPERTY, WHEN SUBJECT TO.—If a mortgage contains stipulations authorizing the mortgagor to sell any portion of the mortgaged property, and requiring him to replace that sold by purchasing with the proceeds other articles of a like kind, which are to be subject to the lien of the mortgage, then the mortgage has the effect of passing to the mortgagee the legal title to the property so acquired. (*Dexter v. Curtis*, 266.)

See Attachment, 3.

CIGARETTES.

See Interstate Commerce, 3-5.

CLOUD ON TITLE.

CLOUD UPON TITLE, WHEN MAY BE REMOVED.—If a deed purporting to convey property in trust was executed by the grantor, and by him placed on record, but is inoperative, because never delivered to, nor accepted by, the grantee, a court of equity has jurisdiction to remove the cloud thereby created upon the title, though no one has attempted or threatened to assert title under such deed. (*Loring v. Hildreth*, 301.)

CO-BENEFICIARIES.

See Trusts, 9.

COLLATERAL ATTACK.

See Executions, 7.

COMMISSIONS.

See Brokers.

COMMON LAW.

See Contracts, 4; Negotiable Instruments, 5; Nuisance, 1; Railroad Companies, 10.

CONDITIONS PRECEDENT.

See Insurance, 9.

CONFLICT OF LAWS.

See Building and Loan Associations, 5; Contracts, 2-5; Evidence, 1; Lotteries, 2; Marriage and Divorce; Negotiable Instruments, 5; Usury, 2, 3.

CONSIDERATION.

See Contracts, 1.

CONTRACTS.

1. **CONTRACTS—CONSIDERATION.**—Confidence induced by the promise of the cashier of a bank to receive money on deposit to be held subject to instructions is a sufficient legal consideration to hold the bank to the performance of the promise. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

2. **CONTRACT—PLACE WHERE DEEMED MADE.**—Where an assignment of notes and of a mortgage by which their payment was secured was signed in one state, and then forwarded to another, where the assignee received and made payment therefor, the contract must be regarded as made in the latter state. (*Roads v. Webb*, 246.)

3. **CONTRACTS—CHANGE IN LAW.**—Every contract, not expressly providing to the contrary, is presumed to have been made with reference to the then existing state of the law, and if a subsequent change is made therein which in any degree affects such contract, such change is presumed to be excepted therefrom. (*Fulmer v. Kane*, 362.)

4. **CONFLICT OF LAWS—LAW OF THE PLACE OF THE CONTRACT—WHEN DOES NOT CONTROL.**—Where the general principles of the common law are to be applied to a contract, the court of the forum will apply those principles according to its judgment, notwithstanding it may have been held differently where the contract was made. (*Roads v. Webb*, 246.)

5. **CONFLICT OF LAWS—PLACE OF CONTRACT—AGREEMENT FIXING.**—Where a contract is entered into between persons residing in different states, they may, by a stipulation in a contract, provide that it shall be considered to be made in one of those states, and when they have done so, the laws of that state control its validity, nature, interpretation, and effect. (*Union etc. Ins. Co. v. Polard*, 715.)

See Building and Loan Associations, 5; Champerty; Evidence, 10, 11; Lotteries, 1, 2; Usury, 2

CONVERSION.

See Cotenancy, 1, 2; Trover; Trusts, 7.

CORPORATIONS.

1. **CORPORATIONS, ATTACK UPON POWER AND AUTHORITY OF.**—In a suit to enjoin an alleged street railway corporation from using a public highway, an abutting property owner cannot obtain relief on the ground that the charter of the defendant is void for constitutional reasons. The state only can inquire into the validity of the charter if the defendant is a *de facto* corporation. (*Taylor v. Portsmouth etc. Street Ry.*, 216.)

2. CORPORATIONS.—A DIRECTOR OF A CORPORATION AS SUCH HAS NO AUTHORITY to make contracts for it. Hence, there is no presumption that a contract purporting to be made in his name by him was authorized by it. (*Morrison v. Wilder Gas Co.*, 257.)

3. CORPORATIONS.—THE PRESENCE OF THE CORPORATE SEAL on a contract purporting to be executed by a corporation is not evidence that the person who affixed it was authorized to do so, or that the contract is the contract of the corporation. (*Morrison v. Wilder Gas Co.*, 257.)

4. CORPORATIONS—CONSTRUCTIVE NOTICE—If a loan is negotiated with a corporation, the fact that its president is also a member of a partnership through which the loan was negotiated for a third person does not charge the corporation with constructive notice of an arrangement between the borrower and the firm that the firm should pay off prior mortgages out of the money loaned. (*Seaverns v. Presbyterian Hospital*, 125.)

5. CORPORATIONS — NOTICE TO PRESIDENT — EFFECT OF.—Notice to the president of a corporation is not notice to the corporation where the president is acting in his own interests and against those of the corporation. Hence, if he is a member of a firm through which a loan is negotiated with the corporation for a third person, but, nevertheless, in the interest of the firm, the corporation is not chargeable with knowledge possessed by its president, as a member of such firm, which he does not communicate, and which the corporation does not know, of facts derogatory to the title of the property on which the loan is made. (*Seaverns v. Presbyterian Hospital*, 125.)

6. CORPORATIONS — UNPAID STOCK — LIABILITY OF STOCKHOLDER.—Under the statute of Illinois, each stockholder of a corporation is answerable for its debts to the extent of the amount unpaid upon his stock, and he cannot escape such liability by an assignment of his stock. (*Sprague v. Nat. Bank of America*, 17.)

7. CORPORATIONS—LIABILITY OF PURCHASER OR ASSIGNEE OF UNPAID STOCK WITHOUT NOTICE.—If stock has been issued as fully paid, and a purchaser or assignee thereof acquires it in good faith, and without notice that it has not been fully paid, he is not answerable to the creditors of the corporation for the balance unpaid. (*Sprague v. Nat. Bank of America*, 17.)

8. CORPORATIONS—LIABILITY OF PURCHASER OR ASSIGNEE OF STOCK WITH NOTICE.—If stock has been issued as fully paid, and a purchaser or assignee thereof acquires it with notice that it has not been fully paid, he is answerable, with the seller or assignor, to the creditors of the corporation, for the balance unpaid. (*Sprague v. Nat. Bank of America*, 17.)

9. CORPORATIONS—SUBSCRIPTIONS TO STOCK—RIGHT OF CREDITOR TO ENFORCE.—The right of a creditor, under the Illinois statute, to enforce liability against one who has subscribed for stock in a corporation and has not paid his subscription in full, is not dependent, in any degree, upon the knowledge possessed by the creditor that such subscription was or was not paid in full. If unpaid to the corporation it must be paid to the creditor. (*Sprague v. Nat. Bank of America*, 17.)

10. CORPORATIONS—GIVING STOCK FOR PROPERTY—VALUE—A corporation, organized under the laws of the state of Illinois may, by agreement, issue its shares of capital stock in payment for property of such character as it may lawfully acquire, and may agree with the subscribers as to the value of such property,

but the agreement, to be valid as a contract, must be made in good faith, and in the exercise of judgment fairly and honestly directed. (*Sprague v. Nat. Bank of America*, 17.)

11. CORPORATIONS—BURIAL OF, IN ONE STATE AND RESURRECTION OF, IN ANOTHER—TRANSFER OF PROPERTY—EXCHANGE OF SHARES—TO WHAT EXTENT STOCK WILL BE DEEMED PAID.—If an Illinois corporation issues its shares of stock in exchange for the property and effects of a foreign corporation, having the same amount of capital stock, and assumes the latter's obligations, under an agreement that the property shall be received at an agreed price, in excess of its value, and equal in amount to the capital stock of each corporation, the stock of the Illinois company will, as against creditors, be deemed paid only to the extent that the fair actual value of the property received exceeds the amount of the indebtedness assumed. (*Sprague v. Nat. Bank of America*, 17.)

12. CORPORATIONS — VALIDITY OF AGREEMENT TO ABANDON CORPORATION IN ONE STATE AND TO CREATE A NEW ONE, WITH ITS ASSETS, IN ANOTHER.—If the shareholders of a foreign corporation, such as a cable railway company of California, find the company in an embarrassed financial condition, and seek to create a corporation in the state of Illinois, under an agreement that the new corporation shall have the same amount of capital stock, that it shall assume the obligations of the old company, and that the property of the latter shall be transferred, by an exchange of stock, to the new corporation, at an agreed price, in excess of its value, but equal in amount to the capital stock of each company, such agreement has no effect to fix the price or value of such property, where the entire stock of the new corporation has been exchanged for the stock of the old company, share for share, without reference to the value of the property represented by such shares, giving to each shareholder the same number of shares in the new corporation that he had in the old; and such transaction does not constitute a contract of bargain and sale. The shareholders cannot thus abandon the old corporation, and relieve themselves of their statutory liability to pay its corporate debts, and yet hold and retain such property as stockholders of the new corporation. (*Sprague v. Nat. Bank of America*, 17.)

13. CORPORATIONS, FOREIGN — LIABILITY OF MEMBERS.—One who becomes a member of a foreign corporation must take notice of the provisions of its charter, and subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation. (*Warner v. Delbridge etc., Co.*, 367.)

See Insurance, 37.

COSTS.

See Wills, 5.

COTENANCY.

1. COTENANTS—LIABILITY OF FOR CONVERSION.—A cotenant may be liable for the conversion of the property of the cotenancy. His part ownership is available only by abatement or in diminution of damages. (*Wing v. Milliken*, 238.)

2. COTENANT—CONVERSION BY—WHAT IS.—A cotenant who contracts to sell timber belonging to the cotenancy, and directs the purchaser to the place where it is and as to the steps to be taken to accomplish its removal, and who receives the purchase price therefor, is guilty of its conversion. (*Wing v. Milliken*, 238.)

3. COTENANCY—LIFE TENANT AND REMAINDERMAN.—One who owns three undivided tenths of a parcel of land in possession, and who is the owner of a life estate in the remaining seven-tenths, is a tenant in common with the owners of the seven-tenths. (*Williamson v. Jones*, 891.)

See Partition, 3-5; Waste, 2, 7.

COUNTIES.

COUNTIES—UNLAWFUL ACTS OF OFFICERS—LIABILITY.—If a county, through its board of commissioners, does an unlawful act, such as erecting and maintaining a dam without authority of law, or adopts and ratifies the act after it has been done, and insists upon retaining the benefit of the illegal act of its officers, it is answerable in damages. (*Schussler v. Board of Commissioners*, 424.)

COVENANTS.

See Party-walls.

CRIMINAL LAW.

1. CONSTITUTIONAL LAW—EX POST FACTO LAW.—CREDITS TO CONVICTS FOR GOOD BEHAVIOR.—If a convict has served one term in prison before the enactment of a statute providing that second term convicts shall be entitled to a less favorable reduction of the time of their sentence for good behavior than is allowed to first term convicts, he is subject to the provisions of such statute as applied to the punishment of a crime committed by him after its enactment. Such statute is not ex post facto in its operation when so applied. (*In re Miller*, 376.)

2. CRIMINAL LAW—TITLE TO PROPERTY TAKEN FROM PRISONER.—Neither an arresting officer nor the state acquires any title to property taken from a prisoner, or lien thereon, until after conviction. A mere accusation does not justify the confiscation of the property of the prisoner. (*Holker v. Hennessey*, 524.)

DAMAGES.

See False Imprisonment, 4, 5; Municipal Corporations, 25-31.

DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS.—A creditor not guilty of fraud may ignore and repudiate a general composition settlement with a debtor, when another creditor, in conjunction with the debtor, has secretly obtained an undue advantage and a fraudulent preference in the composition, and the first-named creditor may recover of the debtor on his original claim. (*Powers Dry Goods Co. v. Harlin*, 460.)

2. MASHALING SECURITIES.—To invoke the doctrine of marshaling securities, both sources of payment must belong to the common debtor. The duty is not invoked against the doubly secured creditor, but against the common debtor, and cannot be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund. (*Blakemore v. Wise*, 781.)

DEEDS.

DEEDS—PASSING OF APPURTENANCES.—Appurtenances will pass by a deed or grant of conveyance, even if the word "appurtenance," or a similar expression, is not used in the instrument. (*Jarvis v. Seele Milling Co.*, 107.)

DEFINITIONS.

DEFINITIONS.—AN APPURTENANCE IS A THING used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. (*Jarvis v. Seele Milling Co.*, 107.)

Contingent Estates. (*Rudy's Estate*, 654.)

Easement. (*Jarvis v. Seele Mining Co.*, 107.)

Final Judgment. (*Sims v. Sims*, 772.)

General and Special Laws. (*Wanser v. Hoos*, 600.)

"Malice." (*Bolton v. Vellines*, 737.)

"Peculiar Benefits." (*Blair v. Charleston*, 837.)

"Public Grounds." (*Sanitary Dist. v. Martin*, 110.)

Vested and Contingent Estates. (*Johnson's Estate*, 621.)

DESERTION.

See Husband and Wife, 2, 3.

DEVISE.

1. WILLS—A DEVISE OF REAL PROPERTY IS NOT ADEEMED OR REVOKED by a subsequent deed of gift of real property made by the testator to the devisee. (*Fisher v. Keithley*, 560.)

2. PERPETUITIES. A devise of land to be held in trust for a term of seventy-five years after the death of the testator is not an attempt to create a perpetuity, and is, therefore, valid, because the estate commences and fully vests on his death. (*Johnston's Estate*, 621.)

3. WILLS.—A CONVEYANCE TO A DEVISEE BY A TESTATOR cannot be held to have been made in satisfaction of such devise, where there is no evidence that the devisee consented to it in such satisfaction. (*Fisher v. Keithley*, 560.)

See Legacies, 2.

DOWER.

See Adverse Possession, 3.

EASEMENT.

EASEMENTS—CONVENIENCE.—To constitute an easement the right or privilege must be necessary or essential to the proper enjoyment of the estate granted. A mere convenience is not an easement. (*Jarvis v. Seele Milling Co.*, 107.)

EJECTMENT.

EJECTMENT—POSSESSION—EVIDENCE.—In an action to recover the possession of land, plaintiff's right to recover may be defeated by showing that defendant is in possession as lessee under a title not in plaintiff. (*Wagener v. Parrott*, 695.)

See Judgment, 13.

ELECTRIC COMPANIES.

1. ELECTRIC LIGHT COMPANIES—DUTY AS TO WIRES.—An electrical company in erecting and maintaining its wires, is only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with

what is inherently probable in the condition of the wires as they relate to the conduct of its business. (*Snyder v. Wheeling Electrical Co.*, 922.)

2. ELECTRIC LIGHT COMPANIES—PLEADING—ALLEGATION BY IMPLICATION.—A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. Thus, if a declaration against an electrical company, for negligence, after alleging the duty of the company to attend to broken wires, contains an averment that a wire was insecurely fastened, came down, and that the current entered one's body, and he fell, and continued to receive it, the declaration may, by implication, be construed to say what it should have positively averred, namely, that the defendant failed to cut off the current from the wire when down. (*Snyder v. Wheeling Electrical Co.*, 922.)

3. ELECTRIC LIGHT COMPANIES—NEGLIGENCE—PRIMA FACIE CASE.—A high, if not the highest, degree of care is exacted of operators of electricity, and, if a wire, charged with a deadly current of electricity, falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current, the law raises a prima facie case of negligence. This presumption, however, is by no means final or conclusive, but may, in the absence of specific neglect connected with the incident, be repelled by evidence of a uniformly careful, prudent management, commensurate with the dangerous character of the wire, and adequate to the safety of the public. (*Snyder v. Wheeling Electrical Co.*, 922.)

4. ELECTRIC LIGHT COMPANIES—NEGLIGENCE—PLEADING—EVIDENCE—VARIANCE.—Under a declaration for negligence, it is only those acts of negligence which have been specified that can be proved. Thus, if a particular act, such as the insecure fastening of an electric wire, is alleged as the cause of the damage, no evidence of other acts causing it can be given, such as bad insulation, or an entire want of insulation, the contact of wires with wet posts, or the failure of duty to attend to broken wires, etc. (*Snyder v. Wheeling Electrical Co.*, 922.)

See Negligence, 9; Railroad Companies, 9.

ELEVATORS.

1. ELEVATORS—CARRIERS OF PASSENGERS.—Persons who operate elevators for raising and lowering persons from one floor to another, in buildings, are carriers of passengers, and subject to the rules governing such carriers. (*Hartford Deposit Co. v. Sollitt*, 35.)

2. ELEVATORS—CARE REQUIRED OF OPERATORS.—Those who operate passenger elevators must use extraordinary care in and about their operation to avoid injury to the passengers. (*Hartford Deposit Co. v. Sollitt*, 35.)

3. ELEVATORS—FALL OF, AS EVIDENCE OF NEGLIGENCE.—The fact of the falling of a passenger elevator is evidence tending to show want of care in its management, or that it was out of repair, or faultily constructed. (*Hartford Deposit Co. v. Sollitt*, 35.)

4. ELEVATORS—FALL OF—LIABILITY FOR.—If a passenger elevator, through faulty construction or management, or neglect in allowing it to remain out of repair, falls, and injures a passenger, the operator is answerable in damages. (*Hartford Deposit Co. v. Sollitt*, 35.)

5. ELEVATORS—NOTICE OF DEFECT—CONTRIBUTORY NEGLIGENCE.—If a person leases one floor of a building, used for business purposes, and secures the privilege of using a freight elevator therein as his necessities may require, the landlord covenanting to keep the elevator and its approaches in repair, but retaining control of the elevator, and an employé of the lessee is injured by reason of the elevator's getting out of repair, whereupon he sues the lessee for the injury, which action the landlord is called upon, by the lessee, to defend, a finding that the lessee's manager had notice, before the accident, that the elevator was out of repair, is not sufficient, in an action by the lessee against the landlord to recover the amount of the judgment against the former, which he has paid, to charge the lessee with contributory negligence in not giving notice of the defect to the landlord, for there was no obligation upon him to give such notice, and the lessee is, therefore, entitled to recover. (*Olson v. Schultz*, 437.)

See Judgment, 10; Landlord and Tenant, 8.

EQUITABLE CONVERSION.

See Wills, 10, 11.

EQUITABLE MORTGAGE.

See Mortgage, 1, 2.

EQUITY.

1. LACHES.—MERE DELAY IS NOT ALWAYS LACHES, as where such delay was due to the near kinship of the parties and their friendly relations. (*Jameson v. Rixey*, 726.)

2. EQUITY.—JURISDICTION OF, INCIDENT TO SETTING ASIDE AN AWARD.—If a suit in equity is brought to set aside an award, and the defendant, by cross-bill asks that he be awarded relief in case the award is found invalid, the court obtains jurisdiction to decide the whole controversy, though the issues are legal in their nature and capable of trial in a court of law, and hence may proceed to determine the differences between the parties and settle the questions between them which were submitted to the arbitrators. (*Coons v. Coons*, 804.)

See Building and Loan Associations, 10; Cloud on Title; Judgment, 26-29; Waste, 3.

ESTATES.

1. ESTATES—INJURY TO.—A TENANT FOR LIFE cannot do anything entailing permanent injury to the estate of the reversioner or remainderman. (*Williamson v. Jones*, 891.)

2. ESTATES—WHEN VESTED AND WHEN CONTINGENT.—An estate is said to be vested in interest when there is a present, fixed right in some one to the future enjoyment of it; it is not vested, but contingent, when either the person who is to enjoy it or the event upon which the estate is to arise, is uncertain. If property is devised or bequeathed to such children or child or individuals as shall attain a given age, or the children who shall sustain a given character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class—preceding such restricted description, so that the uncertain event forms part of the description of the devisee or legatee, the interest is necessarily contingent on account of the person. For, until the age is attained, the character sustained, or the act performed, the person is unascertained. (*Johnston's Estate*, 621.)

3. ESTATES OR GIFTS—WHEN CONTINGENT.—Where the persons who are to take a gift must be living at a certain time, the gift is contingent. Hence, if executors are directed to hold an estate until the death of the testator's wife, and then to sell it and divide the proceeds between his two children, if they be living, or the issue of such of them as may be deceased, a child of the testator dying before his or her mother never had any interest in the estate. (*Rudy's Estate*, 654.)

4. ESTATES—WHEN CONTINGENT AND NOT VESTED.—If land are devised to trustees to be held for seventy-five years, after which they are to be sold and the proceeds divided among all the testator's children who may then be living, and the legal descendants of any of his children who may then be dead, such legal descendants to take only such portion as their deceased parent would have taken if living, no estate vests in any child or the descendant of any child until after the expiration of the seventy-five years. (*Johnston's Estate*, 621.)

5. PERPETUITIES OR GRANTS OF PROPERTY—WHEN THE VESTING OF AN ESTATE OR INTEREST IS UNLAWFULLY POSTPONED.—Such vesting is unlawfully postponed if the power to alienate may not be exercised during lives in being and twenty-one years and nine months thereafter. (*Johnston's Estate*, 621.)

6. PERPETUITIES.—The rule against perpetuities is not concerned with anything but the commencing of the estate, and, where an estate commences within the time allowed by the rule, it is not material that it does not terminate until afterward. (*Johnson's Estate*, 621.)

7. PERPETUITIES—WHEN A VALID PARTICULAR ESTATE MUST BE PRONOUNCED VOID BECAUSE OF A FORBIDDEN REMAINDER.—If an estate is given to trustees to be held for seventy-five years, and then to be sold and the proceeds divided among persons who cannot be surely ascertained until the time for division, the estate and interest of such persons are so remote as to offend the rule against perpetuities, and, as the manifest object of the estate of the trustees was to preserve the property for distribution at such remote time, it must be regarded as invalid, and the whole property as vesting in the heirs at law of the testator. It is clear that the estate of the trustees and the subsequent estate or interest are not separable, but are so related that to uphold one and avoid the other would defeat the main, if not the only, purpose of the testator in making the devise. (*Johnston's Estate*, 621.)

8. PERSONAL PROPERTY—PETROLEUM OIL—UNLAWFUL REMOVAL FROM EARTH—OWNERSHIP.—If the owner in fee of three undivided tenths of a parcel of land in possession, and who is the owner of a life estate in the remaining seven-tenths, extracts petroleum oil from the land without authority, either as life tenant or as tenant in common, seven-tenths of the oil so extracted belongs to the reversioners or remaindermen. (*Williamson v. Jones*, 891.)

See Adverse Possession, 1; Parties; Waste.

ESTOPPEL.

1. ESTOPPEL.—AN INFANT is not estopped by mere silence or quiescence from asserting title to either real or personal property. (*Williamson v. Jones*, 891.)

2. ESTOPPEL.—A MARRIED WOMAN is not estopped by mere silence or quiescence from asserting her title to land. (*Williamson v. Jones*, 891.)

3. ESTOPPEL—SILENCE.—If one who claims a whole tract of land, in possession, but who owns only a part thereof, in fee, and who is a life tenant of the remainder, makes great expenditures in developing the land as oil territory, the mere silence of the remaindermen or reversioners, nearly all of whom are infants and married women, for a period of eighteen months of the time during which such expenditures are being made, does not estop them, in the absence of actual fraud, negligence, or duty to speak out, from asserting their title, particularly where it is not clear that they know their title. They are not bound to go to such person and warn him to desist from his acts, especially where he has knowledge of the defect in his own title. (*Williamson v. Jones*, 891.)

4. ESTOPPEL—NOT BINDING UNLESS MUTUAL—ILLUSTRATION.—An estoppel, to be binding, must be mutual. Hence, if a party to a suit claims title adversely to a former adjudication, not binding on him, he cannot rely on that adjudication as an estoppel against the parties to the former suit. (*Buford v. Adair*, 854.)

5. ESTOPPEL BY DEED, WITH COVENANTS OF GENERAL WARRANTY.—An heir apparent is estopped by his deed, with covenants of general warranty, from afterward claiming his inheritance, and such estoppel extends to his heirs. (*Buford v. Adair*, 854.)

6. ESTOPPEL—DECREE OF SALE.—One who procures a decree that land shall be sold at a judicial sale, and who receives the proceeds of the sale, is afterward estopped from asserting any interest in petroleum oil extracted from the land. (*Williamson v. Jones*, 891.)

See Arbitration and Award, 4; Attachment, 4; Insurance, 11, 12; Judgment, 6; Receivers, 6; Sales, 1; Trusts, 7; Wills, 8.

EVICITION.

See Landlord and Tenant 5-7.

EVIDENCE.

1. CONFLICT OF LAWS—RULES OF EVIDENCE.—Rules of evidence are governed by the laws of the country where the court sits. A statute providing that no portion of an answer to any interrogatory made by an applicant for a policy of insurance shall be used except under certain circumstances may be disregarded in an action upon a policy tried in another state. (*Union etc. Ins. Co. v. Pollard*, 715.)

2. EVIDENCE—RES GESTAE.—Words spoken while an affair is in progress are admissible in evidence in a narrative of the affair. (*Trenton etc. Ry. Co. v. Cooper*, 592.)

3. EVIDENCE—RES GESTAE.—Words spoken by the driver in an effort to control a frightened and runaway horse are admissible in evidence as part of the *res gestae* in an action to recover for injuries resulting from the runaway. (*Trenton etc. Ry. Co. v. Cooper*, 592.)

4. EVIDENCE—AN ACCOUNT-BOOK OF ORIGINAL ENTRIES, fair on its face and shown to have been kept in the usual course of a business, is evidence even in favor of the party by whom it is kept. (*Borgess Investment Co. v. Vette*, 567.)

5. EVIDENCE—ACCOUNT-BOOKS IF IN EXISTENCE, are the best evidence of their contents, and a witness cannot state the condition of such accounts from memory while such books are accessible. (*Greenville v. Ormand*, 663.)

6. EVIDENCE—BOOKS OF ACCOUNT.—A book kept by a party to an action and called a "debit-book," in which was entered the face value of promissory notes, the amount paid therefor, the

amount of discount deducted, the names of the parties from whom purchased, and the purchaser, is admissible in evidence, though the entry may in some way extend to the title or ownership of the property. (*Borgess Investment Co. v. Vette*, 567.)

7. EVIDENCE—ENTRIES IN FAMILY BIBLE NOT MADE BY MEMBER OF THE FAMILY.—The admissibility of an entry in a family Bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family Bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence. (*Union etc. Co. v. Pollard*, 715.)

8. THE LAWS OF ANOTHER STATE ARE FACTS of which the court does not take judicial notice, and which, therefore, must be proved. (*Union etc. Ins. Co. v. Pollard*, 715.)

9. LAWS OF ANOTHER STATE—HOW PROVED.—The revised statutes of another state are admissible in evidence for the purpose of proving its laws, and, when one or more sections are perfect as to their sense and purpose, there is no necessity of introducing the whole of the statute upon a general subject, of which the section offered is a part. (*Union etc. Ins. Co. v. Pollard*, 715.)

10. PAROL EVIDENCE OF OTHER AND ORAL STIPULATIONS MAY BE RECEIVED, when some of the stipulations of a contract are in writing, where the writing or writings, by reason of their brevity, informality, and skeleton nature, do not of themselves imply that all the stipulations of the parties with reference to the subject matter were intended to be expressed in them, and when the particular stipulation is of such a nature that the omission to express it in the writing does not indicate that it was not agreed upon, and it in no way conflicts with the written stipulation, and does not increase the burden of either party. (*Gould v. Boston Excelsior Co.*, 221.)

11. PAROL EVIDENCE RESPECTING WRITTEN CONTRACT FOR CUTTING, DRIVING, PEELING, AND DELIVERING LOGS.—Where a contract for the cutting, peeling, and delivering of logs is silent as to how and by whom they shall be scaled, parol evidence is admissible to prove what were the terms of the agreement between the parties upon this subject. (*Gould v. Boston Excelsior Co.*, 221.)

12. EVIDENCE.—WHAT WITNESSES THINK IS NOT CONCLUSIVE of the fact, unless no other reasonable basis than the one given exists for the existence of such thought or belief. (*Meyers v. Hinds*, 345.)

13. EVIDENCE.—PRIOR EXPERIENCE of a witness before an emergency in which he is called to act is competent evidence to account for his exclamation and conduct in such emergency and to relieve him from any imputation of contributory negligence. (*Trenton etc. Ry. Co. v. Cooper*, 592.)

See Insurance, 26, 31-33; Judicial Sales, 4; Negotiable Instruments, 13, 14; Railroad Companies, 17, 18, 26-28; Suretyship, 1; Trial; Wills, 2.

EXECUTION.

1. EXECUTION—INTEREST OF VENDOR OF REAL PROPERTY—WHEN NOT SUBJECT TO.—One who has made an enforceable contract to sell real property, received part of the purchase money, and placed the vendee in possession, retains only a vendor's lien for the balance of the purchase price, and has no estate subject to the lien of a judgment or execution. A purchaser at a sheriff's sale under a writ against the vendor, with notice of the facts, acquires no title. (*Jones v. Howard*, 546.)

2. PROPERTY OF PRISONER—LIABILITY TO PROCESS.—After final conviction in a criminal case, the purpose of the legal custody of money or property taken from the person of the prisoner

has presumably been accomplished, and it becomes liable to execution, attachment, or garnishment, unless the court shall otherwise direct. (*Holker v. Hennessey*, 524.)

3. GARNISHMENT.—PROPERTY OF PRISONER.—Money or property of a prisoner, lawfully taken from him at the time of his arrest, may be applied to the satisfaction of the judgment against him on the criminal charge, if execution has issued, and, if not so applied before the return of the execution, it must be returned to the prisoner, and is subject to garnishment in the hands of the officer. (*Holker v. Hennessey*, 524.)

4. ATTACHMENT—PROPERTY TAKEN FROM PRISONER. Property not stolen, but wrongfully taken from the custody of a prisoner by an arresting officer, must be regarded as being in the custody of the prisoner prior to his conviction, and is not subject to levy under attachment or execution, and, if rightfully and lawfully taken, it must be regarded as in the custody of the law and subject to the order of the court prior to the conviction of the prisoner, and is not subject to levy under execution, attachment, or garnishment. (*Holker v. Hennessey*, 524.)

5. PROCESS—SERVICE OF BY UNLAWFUL MEANS.—If an officer gets possession of a debtor's property, as by breaking into his dwelling-house without proper authority, and then attaches it on mesne process, or levies upon it on execution, the attachment or levy is void. (*Holker v. Hennessey*, 524.)

6. EXECUTION SALE—VACATING.—It is too late to move to vacate an execution sale for inadequacy of price after the sale has been confirmed and a sheriff's deed has been executed and delivered to the purchaser. (*Media Title etc. Co. v. Kelly*, 618.)

7. EXECUTION SALE—COLLATERAL ATTACK UPON.—It must be presumed, where the law requires sheriff's deeds to be acknowledged in open court, that the court, in taking and certifying the acknowledgment, acted rightly and in accordance with its own rules. (*Media Title etc. Co. v. Kelly*, 618.)

8. EXECUTION—ISSUANCE OF, ON FEDERAL JUDGMENT --WHEN TIME BEGINS TO RUN—FILING OF MANDATE.—The statutory time, fixed by state laws, within which execution must issue to preserve the lien of a judgment does not begin to run, in a case where the owner of a judgment rendered in a federal court is prevented from taking out execution by a writ of error sued out from the supreme court of the United States, and which is made a supersedeas, until the mandate affirming the judgment is filed in the lower court. (*Rock Island Nat. Bank v. Thompson*, 137.)

9. EXECUTION—ISSUANCE OF, ON FEDERAL JUDGMENT --STATE LIMITATION AS TO TIME—WRIT OF ERROR.—A state statute providing that the time during which the owner of a judgment is restrained by injunction or appeal from obtaining execution shall not be considered as a part of the statutory time in which he must take out execution for the preservation of his lien, applies also to a writ of error sued out from a federal court, where it has been made a supersedeas. (*Rock Island Nat. Bank v. Thompson*, 137.)

See Homestead, 6.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—WHEN CHARGEABLE WITH THE VALUE OF THE GOODWILL OF A BUSINESS ENHANCED BY A LICENSE.—One who procures letters of administration on the estate of a decedent who was conducting a saloon business under a lease and a license, neither of which had

expired, is liable, if he takes possession of the premises and continues the business, for the value of the goodwill thereof, which may be enhanced by the fact of such license, though the license itself cannot be transferred to another. (*Buck's Estate*, 616.)

See Judgment, 2, 11, 12.

EXEMPTIONS.

See Taxes, 2-4.

EX POST FACTO LAWS.

See Criminal Law, 1.

FALSE IMPRISONMENT.

1. PLEADING—FALSE IMPRISONMENT.—In a complaint seeking to recover for the false imprisonment of the plaintiff, it is not necessary to aver in express terms that such imprisonment was against the will of the plaintiff, if it is apparent from the whole complaint that the imprisonment of the plaintiff was without any collusion on his part and not with his consent. (*Bolton v. Vellines*, 737.)

2. FALSE IMPRISONMENT.—POLICE COMMISSIONERS ARE LIABLE to an action for false imprisonment in directing the arrest and imprisonment of a citizen for an act which is punishable by fine only. (*Bolton v. Vellines*, 737.)

3. FALSE IMPRISONMENT—MALICE.—An instruction to the jury on the trial of an action for false imprisonment that an improper motive may be inferred from a wrongful act based upon no reasonable ground, that such improper motive constitutes malice in law, and that the act need not be prompted by anger, malevolence, or vindictiveness, but such inference of malice may be removed by evidence, is not erroneous. It clearly defines malice in an action for false imprisonment. (*Bolton v. Vellines*, 737.)

4. DAMAGES IN AN ACTION FOR FALSE IMPRISONMENT. It is proper to instruct the jury that the damages awarded must be compensatory for the loss of time, for suffering, bodily and mental, sustained by reason of the wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorneys' fee, and that if the act was committed with malice, punitive damages may be awarded. (*Bolton v. Vellines*, 737.)

5. DAMAGES FOR FALSE IMPRISONMENT—VERDICT—WHEN NOT EXCESSIVE.—If the plaintiff, who had been a captain of police, and honestly believed that his official life continued until his successor had qualified, on appearing on the streets in the uniform of his former office, was arrested and carried through the streets in a prison van, searched, and kept in prison until released by habeas corpus, there being no right to imprison for his offense, is, in an action for false imprisonment, awarded the sum of one thousand dollars, the verdict will not be set aside as so excessive as to suggest passion, prejudice, or ill-will. (*Bolton v. Vellines*, 737.)

FAMILY BIBLE.

See Evidence, 7.

FAMILY EXPENSES.

See Husband and Wife, 1.

FEME SOLE.

See Husband and Wife, 3.

FENCE LAWS.

See Railroad Companies, 12-16.

FORGERY.

See Banks and Banking, 2.

FRANCHISES.

See Railroad Companies, 1-3.

FRAUD.

See Larceny, 2; Mortgage, 10, 14-16.

FRAUDULENT COMPOSITION.

See Debtor and Creditor, 1; Suretyship, 4.

GAMING.

1. **GAMING.—AN INDICTMENT IS SUFFICIENT** if it charges an offense in the language of the statute. Hence, it is sufficient to allege, in the language of the statute, that the defendant did "keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked," without alleging that such thing "was then and there staked." (Bobel v. People, 64.)

2. **GAMING.—AN INDICTMENT FOR KEEPING A SLOT MACHINE** is sufficient, in its allegations of time and place, where it charges that the defendant, on a certain day, in a particular county and state, "unlawfully and willfully did, in a certain room," et cetera, "keep a certain slot machine," without the use of the words "then and there" before the word "keep." The allegations as to time and place are adverbial clauses, modifying the verb "did keep," and there is no other word in the indictment which they can modify. (Bobel v. People, 64.)

3. **GAMING—KEEPING GAMBLING DEVICES—SLOT MACHINES.**—Under the statute of Illinois, a slot machine is a gambling device, and the mere keeping of it is a criminal offense, whether the machine is used for gambling or not. The purpose of the statute is to suppress such devices altogether, even by their destruction. (Bobel v. People, 64.)

4. **GAMING—KEEPING GAMBLING DEVICE—SLOT MACHINES—EVIDENCE.**—Upon the trial of an indictment, under the Illinois statute, for keeping a gambling device, such as a slot machine, evidence that the machine was used for gambling is admissible to show its character as a gambling device. (Bobel v. People, 64.)

GARNISHMENT.

See Attachment.

GIFT.

1. **A GIFT OR VOLUNTARY TRUST WILL NOT BE ENFORCED** by a court unless fully completed. (Welch v. Henshaw, 309.)

2. **TO RENDER A VOLUNTARY SETTLEMENT VALID AND EFFECTUAL** the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer it and render the settlement binding upon him. (Welch v. Henshaw, 309.)

GOOD-WILL.

See Executors and Administrators.

GUARANTY FOR COLLECTION.

See Negotiable Instruments, 17.

HEAD OF FAMILY.

See Homestead, 2.

HEIRS.

See Estoppel, 5; Judgment, 11-13.

HIGHWAYS.

1. PUBLIC HIGHWAYS, TO WHAT SERVITUDE SUBJECT.—The servitude which the public acquires by taking land for a public use is that of a public use, for the convenience of the public, to be molded or applied as public interests or convenience may demand, and as the methods of mankind may, from time to time, require. Hence a way may be employed for new methods of transit. (*Taylor v. Portsmouth etc. Street Ry.*, 216.)

2. PUBLIC HIGHWAYS — ADDITIONAL SERVITUDE, WHAT IS NOT.—A STREET RAILWAY, by whatsoever power propelled, is not an additional servitude for which an abutting property owner is entitled to additional compensation. (*Taylor v. Portsmouth etc. Street Ry.*, 216.)

See Injunction, 1, 2; Municipal Corporations.

HOMESTEAD.

1. HOMESTEAD, RIGHTS MAY EXIST IN LAND LEASED or sold under contract, where the legal title remains in the vendor. (*Anderson v. Cosman*, 177.)

2. HOMESTEADS—HEAD OF FAMILY.—A landowner who, together with his adopted daughter and her husband, resides on the land, forming one household, is the head of a family within the meaning of the homestead laws entitling him to a homestead exemption. (*Wagener v. Parrott*, 695.)

3. HOMESTEADS—EXTINGUISHMENT BY DIVORCE.—After a husband and wife have resided on her property as their homestead until he has acquired a homestead right therein, an absolute divorce obtained by her against him terminates his homestead right. (*Kern v. Field*, 479.)

4. HOMESTEADS—RIGHTS OF ADOPTED CHILDREN.—An adopted child occupies the same place in the family under homestead exemption laws as a child of the blood. Each must be regarded as a member of the family while the head of the family is alive. (*Wagener v. Parrott*, 695.)

5. HOMESTEADS — ABANDONMENT BY WIFE.—A wife abandons her homestead right in lands held by her husband under a contract of purchase reserving title in the vendor, when her husband, with her knowledge and consent, surrenders such contract to the vendor, who, under agreement between the parties, conveys the land to a purchaser from the husband, and husband and wife thereafter remain on the land as tenants under circumstances entirely inconsistent with any claim of right except as lessees. (*Anderson v. Cosman*, 177.)

6. HOMESTEADS—SALE UNDER EXECUTION.—If lands of less value than the statutory limit are rightfully claimed as a homestead, a sale thereof under execution is void, unless made to obtain the purchase money therefor, or for taxes or other matters expressly enumerated by statute or constitutional provision. (*Wagener v. Parrott*, 695.)

See Injunction, 3.

HUSBAND AND WIFE.

1. **FAMILY EXPENSES—LIABILITY OF WIFE.**—A diamond shirt stud worn by the husband for personal use and adornment is a family expense for which the wife may be liable under a statute which makes the property of husband and wife, or of either of them, liable for family expenses. (*Neasham v. McNair*, 202.)

2. **HUSBAND AND WIFE—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A statute providing that, "when a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had," is not unconstitutional as depriving the husband of his property without due process of law; and under it, the deserted wife may maintain an action to recover for the support and maintenance of a minor child who resided with the family prior to such desertion. (*Allen v. Minnesota Loan etc. Co.*, 446.)

3. **HUSBAND AND WIFE—DESERTION OF WIFE—EFFECT OF, UPON HER PROPERTY RIGHTS.**—If a married woman is deserted by her husband, who goes beyond the limits of the state with no intention of returning, she is thereby restored to all the powers of a feme sole with respect to her separate property. (*Burford v. Adair*, 854.)

4. **HUSBAND AND WIFE—SUIT FOR INJURY TO HER SEPARATE PROPERTY—PARTIES PLAINTIFF.**—A husband and his wife may join in any action at law, or suit in equity, for an injury to her separate estate, or she may sue alone. (*Clay v. St. Albans*, 883.)

5. **HUSBAND AND WIFE—SUIT FOR INJURY TO WIFE'S EQUITABLE ESTATE—PARTIES PLAINTIFF—VARIANCE.**—A husband and his wife may sue together, in trespass, for an injury caused by the flow of surface water upon a lot occupied by them, although she has only an equitable title to the lot, under a trust deed which gives her simply a right to the possession, use, and benefit of the land. Hence, there is no available variance where the declaration avers a freehold estate in her, while the evidence shows that she has an estate only in equity. (*Clay v. St. Albans*, 883.)

6. **HUSBAND AND WIFE—ACTION BY HER FOR THE ALIENATION OF HIS AFFECTIONS.**—Where a wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, she may maintain an action against one who has wrongfully induced her husband to leave her. (*Gernerdt v. Gernerdt*, 646.)

7. **HUSBAND AND WIFE—ACTION BY WIFE AGAINST FATHER OF HER HUSBAND FOR ALIENATING HIS AFFECTIONS.**—A father has the right to advise his son, and, if he acts with proper motives and in good faith in doing so, cannot be regarded as an intermeddler; but a father who, maliciously and with a view to separating his son and the latter's wife, aids, advises, and assists, and by promises or threats, procures his son to leave his wife, is liable to an action by her. (*Gernerdt v. Gernerdt*, 646.)

See Bigamy, 4; Homestead, 5; Injunction, 3; Limitations of Actions, 2; Usury, 2.

IDEM SONANS.

See Names.

INDECENCY.

OBSCENE PICTURES—SALE OF.—A photographer who takes the picture of women in a nude condition, and delivers the

pictures to them, receiving pay therefor, may be convicted under a statute making it a crime to sell obscene, lewd, indecent, or lascivious photographs. (State v. Doty, 205.)

INDICTMENT.

INDICTMENT—PRESUMPTION.—It is presumed that what an indictment does not charge does not exist. (State v. Dale, 513.)

See Burglary, 1, 2, 4; Gaming, 1, 2.

INFANTS.

1. AN INFANT IS BOUND BY A DECREE against him as much as a person of full age, and can impeach it only upon grounds which would invalidate it if against an adult. (Harrison v. Wallton, 830.)

2. INFANTS—RIGHT OF, TO SHOW CAUSE AGAINST A DECREE.—A statute giving infants six months after coming of age to show cause against a decree or order does not prevent them from asserting their rights by a next friend before attaining their majority. (Harrison v. Wallton, 830.)

See Estoppel, 1.

INJUNCTIONS.

1. INJUNCTION BEFORE DEFENDANT HAS BEEN GUILTY OF THE THREATENED INJURY.—It is no objection to the granting of an injunction to prevent a railroad corporation from maintaining and operating a steam railroad in a public alley whereby abutting owners must be deprived of the right of access to and egress from their property, that the defendant has not yet been guilty of the threatened injury, if, in the course of operating its road in the manner contemplated by it, such injury must result. (Sherlock v. Kansas City Belt Co., 551.)

2. STREETS.—ABUTTING PROPERTY OWNERS ARE ENTITLED TO AN INJUNCTION to prevent the maintenance and operation of a steam railroad in a public alley, when such maintenance and operation must destroy its usefulness as a public thoroughfare or unreasonably interfere with the right of the abutting property owners of access to, and egress from, their property. (Sherlock v. Kansas City Belt Ry. Co., 551.)

3. HUSBAND AND WIFE—INJUNCTION.—A husband who has lost his homestead right in the property of his wife by divorce obtained by her against him, may be enjoined from committing trespasses, petty annoyances, and acts of disorderly conduct on the homestead premises. (Kern v. Field, 479.)

See Corporations, 1; Waste, 3.

INNKEEPERS.

1. INNKEEPERS—LIEN ON GOODS OF THIRD PERSON.—A statutory lien given to innkeepers on all property "belonging to or under the control of their guests which may be in such hotel" attaches to samples and their receptacles carried by a traveling salesman, although the innkeeper knew at the time that he received the salesman as a guest that the samples did not belong to him, but to his employer. (Brown Shoe Co. v. Hunt, 198.)

2. CONSTITUTIONAL LAW—INNKEEPERS' LIENS.—A statute giving to innkeepers a lien on all property "belonging to or under the control of, their guests which may be in such hotel" is

not unconstitutional as depriving the owner of his property without due process of law. The statute simply provides for a lien and a possession without making provision as to how the lien shall be enforced. (*Brown Shoe Co. v. Hunt*, 198.)

3. INNKEEPER'S LIABILITY FOR GOODS WHILE IN A STABLE.—If a peddler stops at an inn, and is directed by the innkeeper to take his horse and cart to a stable belonging to the innkeeper, but kept as a livery stable, and the horse and cart are thereupon taken to the stable and delivered into the custody of the hostler, they are thereby delivered to the innkeeper as such, and he is answerable for goods stolen from the cart. (*Cohen v. Manuel*, 225.)

4. THE FACT THAT THE PLAINTIFF WAS PEDDLING WITHOUT TAKING OUT A LICENSE, as required by law, will not prevent his recovering of an innkeeper for goods stolen while he was the latter's guest. It is not unlawful for a peddler, though without a license, to eat, drink, and be sheltered in an inn, and hence his being without such license does not relieve the innkeeper from any of his obligations or liabilities to him. (*Cohen v. Manuel*, 225.)

INSOLVENCY.

See Building and Loan Associations, 13.

INSTRUCTIONS.

1. INSTRUCTIONS.—INCONSISTENCY in instructions is error. (*Snyder v. Wheeling Electrical Co.*, 922.)

2. INSTRUCTIONS—GOOD AND BAD.—A good instruction does not cure a bad one, but it must be withdrawn. (*Snyder v. Wheeling Electrical Co.*, 922.)

3. INSTRUCTIONS.—AN INDEFINITE INSTRUCTION must not be given. (*Clay v. St. Albans*, 883.)

4. JURY TRIAL—INSTRUCTIONS.—The court is not compelled to charge in the exact language of the request; and the party presenting it has no cause of complaint if the proposition of law contained in the request is charged in different language. (*Wade v. Columbia Electric Street Ry. Co.*, 676.)

5. INSTRUCTIONS—ERRONEOUS, IF NOT WARRANTED BY PLEADINGS.—An instruction for the plaintiff, though made relevant by some evidence, is bad if there is no warrant for it under the declaration. (*Snyder v. Wheeling Electrical Co.*, 922.)

See False Imprisonment, 3; Negligence, 9.

INSURANCE.

1. INSURANCE—STATUTES AS A PART OF CONTRACT OF. The statutes of a state in which a contract of insurance is made are as much a part of it as if incorporated in it. (*Union etc. Ins. Co. v. Pollard*, 715.)

2. INSURANCE.—STATUTORY LIENS FOR RENT to accrue, or for unpaid taxes, can invalidate a policy of insurance only when the policy so provides in unmistakable terms. (*Read v. State Ins. Co.*, 180.)

3. INSURANCE—ENCUMBRANCES.—A LEASE of a building in which an insured stock of goods is situated, existing at the time that the insurance is placed, is not an encumbrance within a condition in the policy rendering it void if, without written consent indorsed thereon, the property is encumbered by future mortgage or lien. (*Read v. State Ins. Co.*, 180.)

4. INSURANCE—PROOF OF LOSS—WAIVER.—Any disavowal by an insurance company of its liability to the insured avoids the necessity of furnishing proofs of loss as required by the policy. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

5. INSURANCE—PLEADING.—A complaint for loss based upon a policy of fire insurance to which the policy is attached, and which alleges that the insured has complied with all the requirements of the policy, sufficiently alleges that he has furnished proofs of loss within the time required by the policy. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

6. INSURANCE—AGENCY.—A written statement in a policy of insurance acknowledging one as agent and his testimony that he has a commission from the company are sufficient to show his written appointment as an insurance agent. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

7. INSURANCE—AGENCY—PRESUMPTION.—If an insurance company has appointed an agent to transact business for it, parties dealing with him in that business have a right to rely upon the fact of a continuance of his authority as such agent until informed in some way of its revocation. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

8. INSURANCE — CONDITION OF FORFEITURE — PAROL WAIVER BY AGENT.—Although an insurance policy provides that it shall become void for failure to occupy the dwelling insured for the period of ten days, and contains a stipulation that no officer, agent, or other representative shall have the power to waive such condition, unless such waiver shall be indorsed in writing on the policy, or in some paper adhering thereto, yet a general agent of the company may waive such condition by parol, and his oral statement to the insured that the policy would not be canceled for vacancy without notice to him constitutes such waiver. (*Wilson v. Commercial etc. Assurance Co.*, 700.)

9. INSURANCE—ARBITRATION—CONDITION PRECEDENT. A mere provision in a policy of insurance that in the event of a disagreement as to the amount of the loss, it shall be ascertained by arbitrators, does not make arbitration a condition precedent to the right to recover on the policy. (*Read v. State Ins. Co.*, 180.)

10. INSURANCE — ARBITRATION — INDEPENDENT CONTRACT.—A mere provision in a policy of insurance for arbitration in case of disagreement as to the amount of loss is an independent agreement, collateral to the main purposes of the policy. A breach of such provision cannot be pleaded in bar to an action on the policy, though it may support a separate action. (*Read v. State Ins. Co.*, 180.)

11. INSURANCE—ARBITRATION—ESTOPPEL.—Either party to an agreement to arbitrate a difference concerning an insurance loss who intentionally prevents or unreasonably delays the stipulated method of adjusting their rights is not permitted to plead failure to arbitrate as a defense to an action subsequently brought on the policy. (*Read v. State Ins. Co.*, 180.)

12. INSURANCE — ARBITRATION — ESTOPPEL. — A party whose duty it is to choose an arbitrator to adjust differences concerning an insurance loss must choose an arbitrator who will act with reasonable promptness in naming an umpire, and, in the submission of the dispute, or on his failure so to do, replace him with another, and the other party to the controversy cannot be made to suffer, if without fault, through the inaction of the first party. (*Read v. State Ins. Co.*, 180.)

13. INSURANCE — NOTICE OF ACCIDENT — IMMEDIATE WHAT IS.—If a policy of insurance is issued undertaking to indemnify the insured for injury resulting from accident caused by horses and vehicles used in his business, requiring him, upon the occurrence of an accident and upon receiving notice of a claim on account of an accident, to give notice in writing of such accident or claim, a notice given at once upon receiving information of the accident must be regarded as immediate, though several days intervened between it and the happening of the accident, if the insured exercised ordinary diligence in adopting such measures as would lead to knowledge on his part of the occurrence of the accident and of claims for damages. (*Mandell v. Fidelity etc. Co.*, 291.)

14. INSURANCE—IMMEDIATE NOTICE OF ACCIDENT.—If one, insured against loss from accident is required to give immediate notice of the occurrence of all accidents, himself receives information of a claim that an accident has occurred, and begins, on the next day, an investigation to ascertain the circumstances of the accident, and the nature of claim, and three days later addresses to the insurer a letter giving the notice and information exacted by the policy, the jury is justified in finding that he gave immediate notice within the meaning of the policy. The requirement that notice must be immediately given must have a reasonable construction, having regard to the circumstances of the particular case. The assured must not be guilty of needless and intentional delay, but is not bound to act instantly, nor without taking reasonable time to procure such information as the requirement is intended to furnish to the party to be notified. (*Mandell v. Fidelity etc. Co.*, 291.)

15. INSURANCE—NOTICE OF ACCIDENT.—Where a policy requires notice to be given to the insurer, it is competent and sufficient to show that notice mailed, or attempted to be mailed, to the insurer reached one of its examiners and was by him sent to the insurer, and was returned to the examiner stamped as having been received by the casualty claim department of the insurer. (*Mandell v. Fidelity etc. Co.*, 291.)

16. INSURANCE—NOTICE—HOW MAY BE GIVEN.—Where a policy issued by a New York corporation having agents who countersign the policy, doing business in Boston, stipulates that notice of an accident shall be given in writing by the assured to the insurer, but does not provide for the mode of forwarding it, a notice addressed to the corporation and mailed to the office of its agents in Boston is sufficient, though the number of the office is incorrectly stated in the address, if it appears, from the evidence, that the notice was received by the agents in Boston and was soon afterward in the possession of the corporation in New York. (*Mandell v. Fidelity etc. Co.*, 291.)

17. INSURANCE—KNOWLEDGE OF ACCIDENT NOT IMPUTED TO AN INSURED BECAUSE OF THE KNOWLEDGE OF HIS SERVANTS.—Where a policy insuring against injury resulting from accident requires the assured to give immediate notice of the accident, he is not chargeable with notice of an accident because his servants or employes had such knowledge. They are not his agents for the purpose of giving such notice. (*Mandell v. Fidelity etc. Co.*, 291.)

18. INSURANCE—ACCIDENT—HAZARD—CHANGE OF OCCUPATION.—One insured as by occupation a bookkeeper against accident, under a policy providing that if the insured is injured while engaged in a more hazardous occupation he shall be entitled only to such indemnity as the premiums paid would purchase in the class in which such occupation is classified, and classifying as more

hazardous the occupation of hunting, is entitled to recover the indemnity provided for a bookkeeper, although injured by the discharge of his gun while hunting as a recreation. (*Holiday v. American Mut. Accident Assn.*, 170.)

19. **INSURANCE—ACCIDENT—WAIVER OF DEFENSE.**—The defense that injury resulted from exposure to unnecessary danger under an accident insurance policy is waived by an offer to confess judgment for an amount less than is claimed and by a subsequent motion for a verdict in accordance with such offer. (*Holiday v. American Mut. Accident Assn.*, 170.)

20. **INSURANCE AGAINST ACCIDENT—EXPENSES OF LITIGATION—RIGHT TO RECOVER.**—Under a policy insuring against loss to be suffered from injuries resulting from accident caused by horses and vehicles used in the business of the assured, he may recover expenses incurred by him in defending an action brought against him by a person injured by an accident of the class against which the insurance was affected. (*Mandell v. Fidelity etc. Co.*, 291.)

21. **BENEFICIAL ASSOCIATIONS—ASSIGNABILITY OF CERTIFICATES.**—If a benefit certificate is issued to a member, and the by-laws of the association declare that no assignment shall be deemed binding on it unless made upon application to it and accompanied by the payment of a specific fee and the certificate already issued, such by-laws do not prevent the creation of equitable interests in the fund to be collected; and if an assignment is made, though not in the manner specified, the assignee is entitled, in a controversy between him and the administrator of the assignor, to receive the benefit. (*Brierly v. Equitable Aid Union*, 297.)

22. **BENEFICIAL ASSOCIATIONS.**—By-laws of a beneficial organization cannot be given a retroactive effect and operation unless the retrospective intention clearly appears. (*Roxbury Lodge v. Hocking*, 596.)

23. **BENEFICIAL ASSOCIATIONS—BY-LAWS—CONSTRUCTION.**—The rule that words in a statute ought not to have a retrospective operation unless they are so clearly strong and imperative that no other meaning can be annexed to them, must be applied in the interpretation of the by-laws of a beneficial organization in contests with its members in civil courts. (*Roxbury Lodge v. Hocking*, 596.)

24. **BENEFICIAL ASSOCIATIONS—ACTION TO RECOVER BENEFITS.**—A beneficial organization, by express agreement, constitutional provision, or by-law, may bind its members first to seek their remedy to enforce their rights to benefits in the tribunals of the order, before bringing an action at law, and such agreement or provision enters into and becomes an inseparable part of the contractual relation, and must be adhered to by the member. (*Roxbury Lodge v. Hocking*, 596.)

25. **BENEFICIAL ASSOCIATIONS—ACTIONS TO ENFORCE BENEFITS.**—To secure property rights or enforce money demands against social or beneficial organizations a member thereof may, in the first place, prosecute his claim in the civil courts unless the constitution or by-laws of the organization expressly provide otherwise. (*Roxbury Lodge, v. Hocking*, 596.)

26. **INSURANCE—DECLARATIONS OF THE INSURED AS EVIDENCE AGAINST THE BENEFICIARY.**—Declarations made by the insured respecting his age in an application for a previously issued policy of insurance are not admissible against his beneficiary to prove the facts stated in it. But these facts, being otherwise proved, such declarations are admissible for the purpose of proving

that he had knowledge of the matters so stated, and that his subsequent statements to the contrary were fraudulent. (*Union etc. Ins. Co. v. Pollard*, 715.)

27. INSURANCE—FORFEITURE FOR NONPAYMENT OF ASSESSMENTS.—A forfeiture of insurance in a mutual insurance company for nonpayment of an assessment cannot be sustained when such assessment is not made by the officers designated by law. (*Johnson v. Farmers' Mut. Fire Ins. Co.*, 360.)

28. INSURANCE—ASSESSMENTS.—The charter of a mutual fire insurance company providing that all assessments shall be made by the board of directors, who shall ascertain the amount of loss, determine the sum to be raised as a surplus fund, and make an assessment embracing the loss, the expenses incident thereto, and the sum to be raised as a surplus, which assessment shall be handed to the secretary, who shall inform the members in writing, requires action by the board of directors, in all essential particulars, to the extent of determining the necessary steps to be taken in making the assessment, or at least formally adopting it at a meeting of the board after the performance of the necessary clerical work, and an assessment made by the secretary under a resolution of the board failing to indicate the steps to be taken in making it, is invalid and cannot be rendered valid by the individual ratification of the directors without a formal meeting. (*Johnson v. Farmers' Mut. Fire Ins. Co.*, 360.)

29. INSURANCE, TITLE.—THE TERM, "TENANCY OF THE PRESENT OCCUPANTS," used in a policy of title insurance as a defect in title not insured against, does not include the claim of one in actual adverse possession, asserting ownership in fee against the title insured, but must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are "tenants" in the popular sense of that term. (*Place v. St. Paul Title Ins. etc. Co.*, 404.)

30. INSURANCE, TITLE—ACTION ON POLICY—CONDITION PRECEDENT—WHEN NOT APPLICABLE.—A condition, in a policy of title insurance, that no right of action shall accrue thereunder, "unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or encumbered by reason of a defect or encumbrance for which the company would be liable under this policy," is not available to the insurance company, in an action on the policy, where the land was not only in the actual adverse possession of another at the time the policy issued, but has been absolutely lost by reason of a defect in the insured title. (*Place v. St. Paul Title Ins. etc. Co.*, 404.)

31. INSURANCE—EVIDENCE OF AMOUNT OF GOODS LOST. To ascertain the amount of insured goods in a store at the time of a fire, the insured may introduce in evidence the last invoice previous thereto, the goods bought and amount received on sales in the meantime, and the average profit on such sales. (*Read v. State Ins. Co.*, 180.)

32. INSURANCE—EVIDENCE OF LOSS.—In an action on a policy of insurance on a stock of goods, the insured may show that after the fire he tried to sell the damaged goods and what per cent of the cost price he could get therefor. (*Read v. State Ins. Co.*, 180.)

33. INSURANCE—EVIDENCE OF LOSS.—If, in an action on a policy of insurance on a stock of goods, evidence of their selling price at retail is admitted to show their value, the expense of making such sales may also be taken into consideration. (*Read v. State Ins. Co.*, 180.)

34. INSURANCE—MEASURE OF RECOVERY.—In an action to recover for the loss of insured goods the measure of recovery is the actual and reasonable market value of the goods totally destroyed or rendered worthless, together with the amount of damage or depreciation, if any, to the market value of the goods not destroyed or rendered worthless, as considered in relation to the purpose for which such goods are owned and kept. (Read v. State Ins. Co., 180.)

35. INSURANCE—PRACTICE—SPECIAL VERDICT.—Under a statutory provision that a special verdict shall find only the ultimate facts as established by the evidence, special interrogatories, in an action on an insurance policy, calling for the damage to the insured goods in different parts of a store, and the value of those destroyed, are properly refused as calling for the method or elements considered in reaching the ultimate facts. (Read v. State Ins. Co., 180.)

36. INSURANCE—LIMITATION OF ACTION.—If a policy of insurance provides that no action shall be maintained thereon unless commenced within six months after the fire, and fixes the time of payment as sixty days after notice and proof of loss is furnished, the six months' limitation does not begin to run until the expiration of the sixty days. (Read v. State Ins. Co., 180.)

37. CORPORATIONS FOREIGN — INSURANCE — LIABILITY OF MEMBERS.—An assessment made upon the premium notes of the holder of mutual policies in a Minnesota insurance corporation, made under the statutes of that state and decided to be valid by the courts of that state, to repay unearned premiums on cash policies issued by such corporation, may be enforced in the courts of Michigan against a member of such corporation residing therein, although such assessment would be invalid if the contract of the policy holder were made in the latter state. (Warner v. Delbridge etc. Co., 367.)

See Mortgage, 7.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE—POLICE POWER OF STATE—CONTROL OF CONGRESS.—That which does not belong to commerce may be regulated by the state, under its police power, but that which does belong to commerce falls within the exclusive control of the United States. (State v. Goetze, 871.)

2. INTERSTATE COMMERCE—ORIGINAL PACKAGE—FEDERAL QUESTION.—What constitutes an original package, in interstate commerce law, is a federal question. (State v. Goetze, 871.)

3. INTERSTATE COMMERCE—CIGARETTES—WHAT IS AN ORIGINAL PACKAGE.—If cigarettes are put up in paper boxes, at a factory, in another state, for the manufacturer of cigarettes, each box containing ten cigarettes, and are shipped, for sale, to this state, in a large wooden box, which, for convenience of shipment, contains a number of the smaller paper boxes each paper box must be regarded as an original package, where it has a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were manufactured, the name of the manufacturer, and the internal revenue stamp for the cigarettes, duly canceled, pasted across the end of each package, so as to seal the same, in accordance with the requirements of the act of Congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes. (State v. Goetze, 871.)

4. INTERSTATE COMMERCE — CIGARETTES — RIGHT TO SELL IN ORIGINAL PACKAGE.—Cigarettes manufactured in an-

other state and imported into this state, may be lawfully sold in the original package. (*State v. Goetze*, 871.)

5. **INTERSTATE COMMERCE — CIGARETTES — LICENSING SALE OF—STATE REGULATION—VOID STATUTE.**—A state statute imposing a license fee upon those selling cigarettes at retail is void so far as it applies to cigarettes imported from another state and sold here in the original packages without their being broken. Such an application of the statute is not an exercise of the police power of the state, but an attempt to regulate interstate commerce, with respect to the sale of cigarettes, which the state has no power to do. (*State v. Goetze*, 871.)

6. **LOTTERIES—INTERSTATE COMMERCE.**—A ticket in a lottery authorized at the place of issue is not within the protection of the interstate commerce clause of the federal constitution, nor does such clause give any validity to an agreement, otherwise invalid, concerning such ticket. (*Roselle v. Farmer's Bank*, 501.)

INTERVENTION.

See Attachment, 3, 4.

INTOXICATING LIQUORS.

A **LICENSE TO SELL LIQUOR** is a personal privilege, and therefore is not assignable by the holder and is not an asset of his estate, and does not go to his personal representatives. (*Buck's Estate*, 616.)

JOINT DEPOSITS.

See Banks and Banking, 1.

JOINT LIABILITY.

1. **A JUDGMENT AGAINST ONE OF SEVERAL COTRESPONDENTS** bars any future action against the others, though wholly unsatisfied. (*Petticolas v. Richmond*, 811.)

2. **PRACTICE WHERE ONE OF SEVERAL DEFENDANTS FAILS TO APPEAR.**—If one of two defendants establishes a defense not personal to himself, but going to the foundation of the plaintiff's right to recover, such defense operates in favor of another defendant, though the latter does not answer nor otherwise appear in the suit. (*Harrison v. Wallton*, 830.)

JUDGMENT.

1. **FINAL DECREE, WHAT IS.**—A decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is final; and, on the other hand, every decree which leaves anything to be done by the court in the cause is interlocutory as between the parties remaining in court. (*Sims v. Sims*, 772.)

2. **FINAL DECREE, WHAT IS NOT.**—If in a suit by an executor for the construction of a will and the administration of the estate under the direction of the court, and praying that an account be taken of the decedent's debts, the executor's account settled, and the estate distributed among the parties entitled thereto, the court enters a decree referring the cause to commissioners, to take, state, and report an account of the transactions of the executor and also an account of the debts against the estate, if any, such decree is interlocutory. (*Sims v. Sims*, 772.)

3. **JUDGMENT—THE FORM OF THE ENTRY** of a judgment in the docket of a justice of the peace is to be regarded as imma-

terial, when the truth is stated so as to be intelligible, especially where all formalities, as to such an entry, are dispensed with by statute. (*Davis v. Trump*, 849.)

4. JUDGMENT—SUFFICIENCY OF ENTRY.—The following is a sufficient entry of a judgment by a justice of the peace: "Defendants not appearing, plaintiff demanded judgment for \$112.00 and costs, amounting to \$2.50. Judgment was rendered in favor of plaintiff. C. L. Lester, J. P." (*Davis v. Trump*, 849.)

5. JUDGMENT—ACTION FOR SAME CAUSE BEFORE ANOTHER JUSTICE.—If a cause of action has already been merged into an intelligible judgment, rendered by a justice of the peace, though defective in form and grammar, the plaintiff should not be permitted to bring another action, against the same parties and for the same cause, before another justice. His proper course is to have the defective judgment corrected by the justice who entered it. (*Davis v. Trump*, 849.)

6. ESTOPPEL BY JUDGMENT—DISPUTING MATERIAL FACT.—One who relies upon an adjudication as an estoppel cannot dispute the truth of a material fact on which such adjudication was founded. (*Buford v. Adair*, 854.)

7. PLEADING—PLEA OF FORMER JUDGMENT.—If a plea of former judgment is interposed, and the plaintiff admits the existence of the record, that ends the matter, for the plea bars his suit; but, if he wishes to deny it, he should do so by replying that there is no such record, and praying that it be inquired of by the record. (*Davis v. Trump*, 849.)

8. PLEADING—PLEA OF FORMER JUDGMENT.—A plea of former judgment should set forth the portion of the record relied on, so that issue may be properly joined thereon, and the court may examine and compare the record with the recital in the plea. (*Davis v. Trump*, 849.)

9. JUDGMENT—RES JUDICATA.—If questions are litigated in an action, the judgment therein is conclusive as to those questions in a subsequent action involving the same subject matter. (*Olson v. Schultz*, 437.)

10. JUDGMENT—ELEVATOR ACCIDENT—RES JUDICATA.—If a person leases one floor of a business building, and obtains the privilege of using a freight elevator therein as his necessities may require, the landlord covenanting to keep the elevator and its approaches in repair, but retaining control of the elevator, and one of the lessee's employes is injured by reason of the elevator's getting out of repair, whereupon he sues the lessee for the injury, which action the landlord is seasonably notified to defend, a judgment for the employe, entered upon a verdict, is conclusive against the landlord, in a subsequent action against him by the lessee to recover the amount of such judgment and costs, which the lessee has paid, that the elevator was out of repair, that the employe was injured by reason of its defective condition, and as to the amount of damages sustained by the employe. (*Olson v. Schultz*, 437.)

11. RES JUDICATA — SECOND ACTION INCONSISTENT WITH A PRIOR JUDGMENT.—The proceedings in a cause not only bar a second suit between the same parties or their privies upon the same claim or demand, but they also bar a suit between the same parties or their privies upon a different cause of action, if it appears that the issue presented in the later suit was involved and determined in the former. Hence, if in a suit against the executor and infant heirs of an estate a claim is established against it, such heirs cannot maintain a subsequent action against the executor on the ground that the claim so established did not exist or was excessive,

and he therefore ought to have defeated it. (*Harrison v. Wallton*, 830.)

12. **RES JUDICATA.**—Where the validity of a claim against the estate of a decedent is established by a decree against the executor and heirs, there can never be a recovery in a subsequent suit on the ground that the claim was invalid, while the former decree remains in force. (*Harrison v. Wallton*, 830.)

13. **JUDGMENT—WHEN NOT RES JUDICATA—PARTIES AND SUBJECT MATTER.**—A determination, in an action of ejectment, that a will is invalid and cannot pass title to certain land, and that the plaintiff is entitled to only one-half thereof, does not, in a subsequent action of ejectment against different parties to recover the other half, brought by heirs who were not made parties to the first action, estop the parties to the last action from litigating the title as to such other half, or the validity of the will as to the whole. (*Buford v. Adair*, 854.)

14. **MOTIONS AND ORDERS—RES JUDICATA.**—In determining a motion, after a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion and an order made in conformity therewith, affecting a substantial right, and appealable, is an adjudication binding upon the parties, and conclusive as to the point determined. (*Truesdale v. Farmers' Loan etc. Co.*, 430.)

15. **MOTIONS AND ORDERS — RES JUDICATA — ORDER FOR PAYMENT OF COUNSEL FEES.**—If an order is made, in proceedings to compel the foreclosure of a railway trust deed or mortgage, given to secure certain bonds, allowing fees to the counsel who represents the trustee named in such deed or mortgage, as well as the bondholders, for less than the amount claimed, and the amount allowed is directed to be paid over to such counsel, by order of the court, which then sets apart, out of trust funds in such proceedings, and directs to be paid to a trust company, money to meet interest on bonds held by the parties whom the counsel has represented in the proceedings named, such money is a part of the trust funds, and the order allowing fees is a bar to an action by such counsel for the same services and to impress a lien therefor on the money in the custody of the trust company, notwithstanding a provision in such order that payment of the amount allowed should not preclude a recovery, by the counsel, of further compensation from the persons represented by him. A proceeding to reach funds, in the hands of the court, as part of the trust estate, is not an action against the parties or persons so represented, and does not come within the saving provision of the order. (*Truesdale v. Farmers' Loan etc. Co.*, 430.)

16. **A JUDGMENT CREDITOR HAS NO LIEN UPON PURCHASE MONEY DUE** to a judgment debtor for lands sold by him and which are subject to the judgment lien. (*Blakemore v. Wise*, 781.)

17. **JUDGMENT LIENS.— A JUDGMENT CREDITOR HAS THE RIGHT TO REST UPON HIS LIEN** without pursuing the debtor's personal property. (*Blakemore v. Wise*, 781.)

18. **JUDGMENT, FEDERAL—LIEN—FEDERAL LAW.—THE TERRITORIAL EXTENT** of the lien of a federal judgment is a question of federal law. (*Rock Island Nat. Bank v. Thompson*, 137.)

19. **JUDGMENT, FEDERAL—LIEN—TERRITORIAL EXTENT OF.**—The lien of a judgment of a federal court is coextensive with the territorial jurisdiction of the court which pronounced such judgment, and is not confined to the county in which the court sat when it rendered judgment, although, under the state law, a judg-

ment may be a lien only in the county in which it was entered. (Rock Island Nat. Bank v. Thompson, 137.)

20. JUDGMENT, FEDERAL—LIEN—RETROACTIVE STATUTE—FAILURE TO FILE TRANSCRIPT, EFFECT OF.—A statute requiring a transcript of a judgment rendered in one county to be filed with the clerk of another county before the judgment shall create a lien on the debtor's real estate in the latter county is not retroactive in its operation, and a federal judgment rendered prior to the enactment of such a statute is a lien upon the defendant's real estate situated in any county within the territorial jurisdiction of the federal court, although no transcript of the judgment was filed in such county. (Rock Island Nat. Bank v. Thompson, 137.)

21. MARSHALING SECURITIES—EFFECT OF RELEASING A LIEN AS TO PART OF THE PROPERTY SUBJECT THERE-TO.—If a judgment creditor has as such a lien covering the debtor's lands and also certain lands which the debtor has sold, such creditor may release the land so sold without impairing his right to assert his judgment lien against all the other lands of the debtor, though at the date of such release junior judgment liens existed against the judgment debtor. The junior judgment creditors have no right to complain of such release, though when it was made the lands released had not been fully paid for and the judgment creditor did not insist that the balance of the purchase price be paid toward the satisfaction of his judgment or of the judgments in favor of the junior judgment creditors. (Blakemore v. Wise, 781.)

22. JUDGMENT.—PARTIES UNASCERTAINED AND UNBORN WHO ARE CONTINGENTLY INTERESTED in real property, may, under the statutes of Massachusetts, be represented before the court, so that a decree affecting their rights can be entered by appointing a guardian ad litem for them. The suit is then assumed to be a proceeding in rem against the land, in which a decree may be entered which shall operate directly on the land. (Loring v. Hildreth, 301.)

23. CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING JUDGMENTS BINDING PERSONS UNASCERTAINED AND UNBORN is not unconstitutional, if their interests are contingent, and the court is required to appoint a guardian ad litem to represent them, and is authorized to render judgment which shall operate in rem on the land involved. (Loring v. Hildreth, 301.)

24. JUDGMENTS—PERSONS NOT IN BEING, WHEN BOUND BY.—If all the persons in being having an interest in real property are before the court, they are regarded as representing those coming after them with contingent interests, and such persons, when they come into being, are bound by the judgment against those who thus represent them. (Harrison v. Wallton, 830.)

25. JUDGMENT—NOTICE TO APPEAR AND DEFEND—RES JUDICATA.—If a landlord, who has covenanted with his tenant to keep a freight elevator on the premises in repair, is given notice of the pendency of an action brought by an employé of the tenant to recover damages for personal injuries caused by the elevator's becoming out of repair, and the landlord is offered an opportunity to appear and defend, which he neglects and refuses to do, he is as effectually concluded by the judgment upon contested questions litigated in such action as if he had appeared and contested those questions upon the merits. (Olson v. Schultz, 437.)

26. JUDGMENT—RELIEF FROM IN EQUITY BECAUSE OF USURY.—A court of equity will relieve against a judgment obtained by default upon a contract tainted with usury. (Greer v. Hale, 814.)

27. JUDGMENTS AND DECREES.—RELIEF IN EQUITY WILL NOT BE AWARDED against a judgment or decree on the ground

that the complaint in the cause did not warrant it, where the court had jurisdiction of the cause and of the parties. (*Preston v. Kindrick*, 777.)

28. JUDGMENTS AND DECREES.—TO OBTAIN RELIEF IN EQUITY AGAINST A JUDGMENT OR DECREE on the ground that the process was not served on the defendant, he must show that he did not have actual notice of the proceeding before the judgment or decree was entered and that he had a meritorious defense. (*Preston v. Kindrick*, 777.)

29. JUDGMENT OR DECREE BASED UPON FALSE RETURN OF SERVICE OF PROCESS—RELIEF FROM IN EQUITY.—Where a false return of the service of process upon which a judgment or decree was based was not procured or induced by the plaintiff, and he is in no way connected therewith, the defendant cannot obtain relief in equity, but is left to his remedy against the officer who has made the false return, except in those instances where relief can be procured by motion in the original action or suit. (*Preston v. Kindrick*, 777.)

30. JUDGMENTS—RELIEF FROM—PARTIES ESSENTIAL IN A SUIT FOR.—Parties whose rights might be affected by setting aside a decree are necessary parties to a suit by them for that purpose. (*Harrison v. Wallton*, 830.)

See Joint Liability; Partition, 6; Trial, 8; Trusts, 8.

JUDICIAL NOTICE.

See Evidence, 8.

JUDICIAL SALES.

1. JUDICIAL SALES—DIFFERENCE BETWEEN AND THE TERMS OF THE DECREE.—Though the terms of a sale as reported by the commissioners differ from the terms of the decree under which they acted, the confirmation of the sale as thus reported cures these irregularities. (*Robertson v. Smith*, 723.)

2. JUDICIAL SALES.—A PARTY BY BUYING AT A JUDICIAL SALE SUBJECTS HIMSELF to the jurisdiction of the court, and, in effect, becomes a party to the proceedings in which the sale is made, and may be compelled to comply with his purchase by the process of the court. (*Robertson v. Smith*, 723.)

3. JUDICIAL SALES — PURCHASE — NOTICE OF WHAT RECORD DISCLOSES.—A purchaser at a judicial sale is conclusively presumed to have notice of all facts disclosed by the record of the case, which touch the rights of others in the property sold. (*Williamson v. Jones*, 891.)

4. JUDICIAL SALES—PROCEEDING AGAINST PURCHASER —MODE OF TAKING EVIDENCE UPON.—Upon confirming a commissioner's report of a sale or a rule against the purchaser or bidder at such a sale, to show cause why he should not be required to comply with the terms of his purchase or bid, courts of equity must be able to act in a summary manner. Either party may use ex parte affidavits, or the trial court may, in the exercise of a just discretion, require depositions to be taken, so that an opportunity for cross-examination may be had, or may refer the matter to one of its commissioners. (*Robertson v. Smith*, 723.)

5. JUDICIAL SALES—STATUTE OF FRAUDS.—Judicial sales made by a chancery court acting through its commissioners are not within the statute of frauds, but are binding upon the purchaser without any written contract or memorandum of sale signed by him or his agent. (*Robertson v. Smith*, 723.)

See Estoppel, 6.

JURISDICTION.

See Judicial Sales, 2.

JUSTICE OF PEACE.

See Certiorari; Judgment, 3-5.

LACHES.

See Equity, 1; Partition, 2.

LANDLORD AND TENANT.

1. A LANDLORD DOES NOT OWE TO A LESSEE, nor to the servants or employes of the lessee, the duty of making an examination of the leased premises before turning them over to the lessee, for the purpose of determining whether appliances used therein are in such a condition that no injury shall result therefrom to the lessee or his employes from their being out of repair or weakened by the use already made of them, where the lessee, by reasonable effort, could have discovered and guarded against danger as well as the lessor. (*Whitmore v. Orono Pulp etc. Co.*, 229.)

2. THE RULE OF CAVEAT EMPTOR IS AS APPLICABLE TO A LEASE as to a sale of real property. Hence, neither the lessee nor his servants can recover of the lessor for injuries resulting from an appliance, constituting part of the leased premises, being out of repair or so weakened by its previous use that its further use must expose the lessee or his servants to the peril of personal injury. (*Whitmore v. Orono Pulp etc. Co.*, 229.)

3. ELEVATORS—INJURIES CAUSED BY DEFECTS—LIABILITY.—If one floor of a business building is leased, the tenant having the use of a freight elevator therein in common with the landlord and tenants, the landlord is answerable for the safe condition of the elevator, where he retains control over it and its approaches, and particularly where he has covenanted to keep the elevator and its approaches in repair. He is answerable for an injury caused by its being out of repair, although he had no knowledge of such defect. (*Olson v. Schultz*, 437.)

4. LANDLORD AND TENANT—DUTY OF THE FORMER TO DISCOVER AND WARN THE LATTER OF LATENT DEFECTS. An owner of property, unaffected by a public use, does not owe to his prospective lessee the duty of actively exerting ordinary care, at the time of the leasing, to discover and apprise him of unknown defects which the lessee could equally well find out for himself. (*Whitmore v. Orono Pulp etc. Co.*, 229.)

5. LANDLORD AND TENANT.—THE EVICTION OF A TENANT by a landlord from any part of the leased premises suspends the rent under the lease. Where, therefore, a landlord constructs a wall which encroaches upon part of the premises, he cannot recover rent from his tenant remaining in possession of the balance, whether such balance is materially changed in its character or beneficial enjoyment or not. (*Smith v. McEnany*, 272.)

6. AN EVICTION FROM PART OF THE LEASED PREMISES does not necessarily terminate the lease or the obligations of the tenant under it, but it relieves him, during its continuance, from the obligation to pay rent. (*Smith v. McEnany*, 272.)

7. LANDLORD AND TENANT.—RENT CANNOT BE APPORTIONED if a landlord evicts his tenant from any appreciable portion of the leased premises, the tenant is exonerated from all liability for rent where such eviction continues, though he remains in possession of the greater and more valuable part of such premises. (*Smith v. McEnany*, 272.)

8. PERPETUITIES — COVENANT FOR RENEWAL OF LEASE.—A lease does not create a perpetuity by reason of a covenant for renewal at the option of one of the parties, unless an intention to create such perpetuity appears in clear and unequivocal language upon the face of the instrument. (*Brush v. Beecher*, 373.)

9. PERPETUITIES — COVENANT FOR RENEWAL OF LEASE.—A lease for a term of years providing that the lessors, their executors, administrators, or assigns may, at the end of the term, purchase buildings erected by the lessee at a certain fixed valuation, and, if they do not make such purchase, the lease shall continue for a similar term and succeeding terms under the same conditions, and that if the lessee, his executors, administrators, or assigns, do not keep all the conditions of the lease, it shall immediately cease and be utterly void does not provide for renewals beyond the lives of the parties, nor create a perpetuity. (*Brush v. Beecher*, 373.)

See Elevators, 5; Judgment, 10, 25; Master and Servant, 18; Nuisance, 3.

LARCENY.

1. LARCENY—VOLUNTARILY PARTING WITH PROPERTY IS NOT.—The crime of larceny always includes the taking and conversion of property without consent of the owner. Hence, there can be no larceny if the owner voluntarily parts with the possession and title of property. (*Stewart v. People*, 133.)

2. LARCENY—VOLUNTARILY PARTING WITH DRAFT—FRAUDULENT REPRESENTATIONS.—Inducing the owner of a draft, by fraudulent and unfair representations, to voluntarily part with its possession and title, is not larceny. (*Stewart v. People*, 133.)

3. LARCENY—VARIANCE BETWEEN PROOF AND ALLEGATION.—If an indictment charges the theft of "Old Virginia Natural Leaf" tobacco, while the evidence shows that the tobacco stolen was "Let Go" and "Green's Virginia Leaf," the variance between the allegation and the proof is of no avail to the accused, unless material to the merits of the case and prejudicial to the accused. (*State v. Dale*, 513.)

LAWS OF OTHER STATES.

See Appeal, 8; Evidence, 8, 9; Trial, 6, 7.

LEADING QUESTIONS.

See Appeal, 3.

LEASES.

See Landlord and Tenant.

LEGACIES.

1. WILLS.—THE RULE RESPECTING THE ADEMPION OF LEGACIES was adopted by courts of equity to prevent a child from getting a double portion, an inequality which it is but fair to presume the testator did not intend. (*Fisher v. Keithley*, 560.)

2. WILLS.—THE DOCTRINE OF ADEMPION applies only to cases of personal property, and is entirely inapplicable to devises of real property. (*Fisher v. Keithley*, 560.)

3. WILLS.—THE DOCTRINE OF ADEMPION CANNOT BE APPLIED where the property subsequently transferred by the testator to the legatee was transferred for a valuable consideration

and upon an agreement that the latter would support the former. (Fisher v. Keithley, 560.)

LEGISLATURE.

CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—Although the legislature may, for legitimate purposes, delegate the taxing power to municipalities, it cannot be delegated, without the consent of the people of the municipality, to any person or persons not elected by, and immediately responsible to, the people. (State v. Mayor etc. of Des Moines, 157.)

LIBEL.

LIBEL—WORDS NOT ACTIONABLE.—A publication by letter, stating of one that he has for some years owed for medical attendance, that his attention has been repeatedly called thereto to no purpose, that being sued therefor, and having no other defense, he has cowardly slunk behind that of statutory limitation, which course is not in accordance with the writer's idea of strict integrity, is not actionable as a libel. (Hollenbeck v. Hall, 175.)

LICENSE.

See Intoxicating Liquors.

LIENS.

LIENS—PRIORITY OF ON STOLEN PROPERTY.—Under a statute providing for the restoration of stolen property, and that "the party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state," the lien of the injured party can only be enforced after conviction of the criminal, though it dates from the arrest, while the lien of the state, though it dates only from conviction, takes precedence over that of the injured party. (Holker v. Hennessey, 524.)

See Innkeepers, 1, 2; Insurance, 2; Judgment, 16-21; Partition, 7-9.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS—OWELTY.**—There was no statute in Virginia, prior to 1877, limiting the time within which a lien for owelty in partition could be enforced. (Jameson v. Rixey, 726.)

2. **STATUTE OF LIMITATIONS IN ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS.**—Though a husband is procured to desert his wife by words spoken of her by his father, her action for the injury thus sustained by her is not in form and substance an action of slander, and therefore is not barred by the statute of limitations applicable to actions for that offense. (Gernerd v. Gernerd, 646.)

3. **PLEADING—PLEA OF STATUTE OF LIMITATIONS—WHEN DEMURRABLE.**—A plea of the statute of limitations, though perfect in form, is demurrable where it is interposed to an amended complaint filed more than two years after the injury alleged in an action for negligence. (Chicago etc. Ry. Co. v. Gillison, 117.)

4. **PLEADING—PLEA OF STATUTE OF LIMITATIONS—WHEN DEMURRER TO SHOULD BE SUSTAINED.**—A demurrer to the plea of the statute of limitations, interposed to an amended complaint filed more than two years after the injury alleged in an action for negligence, should be sustained, if the

amended count merely restates the same cause of action made by the original count filed in time. (*Chicago etc. Ry. Co. v. Gillison*, 117.)

See Partition, 4.

LIS PENDENS.

LIS PENDENS.—A PURCHASER PENDENTE LITE CAN STAND NO BETTER than the original defendant and takes the property subject to all the incidents of the suit, including the possible amendment of the bill. (*Long v. Richards*, 281.)

LOGGING.

See Evidence, 11.

LOTTERIES.

1. LOTTERIES—AGREEMENT CONCERNING.—A contract in the nature of a partnership in lottery tickets is invalid and against public policy, and cannot be made the subject of an accounting and settlement. (*Roselle v. Farmers' Bank*, 501.)

2. LOTTERIES.—THE VALIDITY OF AN AGREEMENT to pool lottery tickets and share in the proceeds of a lottery to be drawn in another state must be determined by the law of the state where made, and the fact that the lottery is valid in the state where the tickets are drawn does not give them, or an agreement concerning them, validity in another state. (*Roselle v. Farmer's Bank*, 501.)

See Interstate Commerce, 6.

MANDAMUS.

MANDAMUS — BOARDS OF HEALTH.—Mandamus is the proper remedy to compel a board of health to perform its duty in awarding compensation for damages to private property arising from its official action. (*Safford v. Detroit Board of Health*, 332.)

MARRIAGE AND DIVORCE.

MARRIAGE AND DIVORCE—CONFLICT OF LAWS.—If a party goes from one state to another, and is actually a resident of the latter state at the time of commencing an action for divorce in the courts of that state, the judgment of divorce rendered therein is valid, though irregular by reason of the fact that such party has not resided in that state as long as its laws require before commencing the action. (*Kern v. Field*, 479.)

See Bigamy, 1-3; Homestead, 8.

MARRIED WOMEN.

See Estoppel, 2.

MARSHALLING SECURITIES.

See Debtor and Creditor, 2.

MASTER AND SERVANT.

1. MASTER AND SERVANT—WHAT RISKS ARE NOT ASSUMED.—A servant does not, from the mere fact of employment, assume risks not ordinarily connected with the service, and which are attributable to the master's failure to exercise reasonable care and prudence. (*Chicago etc. Ry. Co. v. Gillison*, 117.)

2. MASTER AND SERVANT—RISKS OF SERVICE AND GRADES OF EMPLOYMENT.—One who enters the service of another assumes the risks naturally incident to the employment, including the danger of injury by the fault or negligence of another employé in the same employment, and the mere fact that one engaged in the same employment is, by the employer, made a leader, boss, or by whatsoever name he is designated or known, to see to the execution of the work, does not put him in such authority that he is to be deemed a vice-principal. (*Norfolk etc. R. R. Co. v. Houchins*, 791.)

3. MASTER AND SERVANT—LATENT DEFECTS—DUTY OF MASTER.—A master is not an insurer of his servant's safety, but he must use reasonable care to protect him from injury arising from latent defects in appliances for the servant's work. (*Edward Hines Lumber Co. v. Ligas*, 38.)

4. MASTER AND SERVANT—SAFE PLACE TO WORK—DUTY OF MASTER.—The duty of a master to provide his servant with reasonably safe appliances and places to work is a personal one, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance. (*Edward Hines Lumber Co. v. Ligas*, 38.)

5. MASTER AND SERVANT—SAFE PLACE TO WORK—HANDLING LUMBER—MASTER'S LIABILITY FOR INJURY.—A master is answerable for the negligent performance, by his servant, of a duty to place boards, in a lumber yard, in position for a scaffold on which other servants are to stand while handling lumber. Hence, if the servant tells a workman to go upon the scaffold, and, in doing so, he stands upon a board which projects from a pile of lumber to support the scaffold, but which is defective by reason of a knot therein not noticeable, and the board breaks, precipitating the workman to the ground, and injuring him, the master is liable. (*Edward Hines Lumber Co. v. Ligas*, 38.)

6. MASTER AND SERVANT—FAILURE TO WARN SERVANT OF DANGERS.—A servant who is pushing cars on a railway track in front of him, and who is injured by being struck by other cars pushed by other servants on the same track, cannot recover because the latter did not warn him of the approaching cars, when he was familiar with the work and knew the danger to which he exposed himself when walking behind the cars he thus pushed. (*Moore Lime Co. v. Richardson*, 785.)

7. MASTER AND SERVANT—SAFE PLACE TO WORK—NOTICE, BY SERVANT, OF DEFECTS.—A servant must take notice of patent defects, but is not bound to examine for latent defects, and may act on the presumption that the master has discharged his duty in preparing the place for his work, so as to make it reasonably safe for the use to which it is to be put. (*Edward Hines Lumber Co. v. Ligas*, 38.)

8. MASTER AND SERVANT—RULES REGULATING WORK, MASTER, WHEN NOT NEGLIGENT IN NOT ADOPTING.—When cars are left on a railroad siding to be loaded, and are required to be moved a short distance down a slight grade to a point where they can be loaded, and this moving is done not by steam, but by a gang of laborers, the work is neither complex nor difficult, and the master is not guilty of negligence because he failed to adopt a set of rules to control such work. (*Moore Lime Co. v. Richardson*, 785.)

9. MASTER AND SERVANT—RULES. DUTY OF MASTER TO ADOPT AND PROMULGATE.—One of the positive duties of a master is to adopt rules for the protection and safety of his employés,

where he is engaged in a complex business requiring definite rules for their protection. The failure to adopt such rules is negligence rendering the master answerable for resulting injuries. (Moore Lime Co. v. Richardson, 785.)

10. MASTER AND SERVANT—SAFE PLACE TO WORK—FELLOW-SERVANTS.—A person who is charged by a master with the duty of preparing a place for a servant to work is not to be regarded as a fellow-servant of him who uses the place. (Edward Hines Lumber Co. v. Ligas, 38.)

11. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE.—One who is working in the same gang with the plaintiff, but who was at the time acting as foreman in doing the work of moving cars, was his fellow-servant, and not a vice-principal. Hence the plaintiff cannot recover because injured by the negligence of such fellow-servant. The foreman of a gang of laborers, who is himself under the management and control of a superintendent, is a fellow-servant of the persons working under and with him. (Moore Lime Co. v. Richardson, 785.)

12. MASTER AND SERVANT—COMBINED NEGLIGENCE OF MASTER AND FELLOW-SERVANT—MASTER'S LIABILITY.—A master is liable to his servant for an injury caused by the combined negligence of the master and a fellow-servant, where it would not have happened but for the master's negligence. (Chicago etc. Ry. Co. v. Gillison, 117.)

13. MASTER AND SERVANT, TEST TO DETERMINE WHO IS VICE-PRINCIPAL.—When a negligent servant is performing some duty which the master owes to another servant for the latter's safety, and which, therefore, cannot be delegated to another, such negligent servant is a vice-principal. (Norfolk etc. R. R. Co. v. Houchins, 791.)

14. MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS NOT.—An engineer in charge of an engine in an ice factory, who is directed by his superior to do certain work necessary to the removal of ice from the pipes, and who, in turn, gives directions to another employé for the doing of such work, is not a vice-principal, but a fellow-servant with the latter, and hence their common employer is not liable for the negligence of such engineer in giving directions, though they lead to the injury of the other employé. (Provost v. Citizens' Ice etc. Co., 659.)

15. MASTER AND SERVANT—VICE-PRINCIPAL DISOBEYING ORDERS—LIABILITY OF THE MASTER FOR.—If a master gives an express order not only what to do, but how to do it, even a vice-principal is bound to obey, and becomes, for the time, a mere coemployé, and the master is not answerable to another employé for injury received through such vice-principal's directing the work to be done in a manner different from that directed by the master. He is not bound to personally supervise the doing of the work, but is entitled to assume that his orders will be carried out. (Provost v. Citizens' Ice etc. Co., 659.)

16. MASTER AND SERVANT.—A VICE-PRINCIPAL, FOR WHOSE NEGLIGENCE AN EMPLOYER IS LIABLE TO OTHER EMPLOYEES, MUST BE EITHER one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work, but control of the business, and exercising no discretion or oversight over him, or one to whom he has delegated a duty of his own, which is a direct, personal, and absolute obligation from which nothing but performance can relieve him. (Provost v. Citizens' Ice Co., 659.)

17. INDEPENDENT CONTRACTOR—LIABILITY FOR.—One who employs an independent contractor to make and conduct an exhibition is not relieved from responsibility to persons receiving injury, if the exhibition is of a kind which will probably cause injury to spectators unless due precautions are taken to guard against harm. (*Thompson v. Lowell etc. Street Ry. Co.*, 323.)

18. MASTER AND SERVANT—INJURY TO SERVANT—MASTER'S LIABILITY—REMEDY OVER UPON COVENANT.—If one leases premises, and the landlord covenants to keep them in repair, but the lessee's employé is injured by their becoming out of repair, the master is primarily liable to his servant, but has a remedy over against the landlord, on the covenant, to recover the amount which the master or lessee has been legally obliged to pay the employé on account of such injury. (*Olson v. Schultz*, 437.)

See Nuisance, 3; Railroad Companies, 19-23.

MECHANICS' LIEN.

1. MECHANICS' LIENS—MATERIALMEN.—One who sells building material to a dealer in the usual course of trade, without any knowledge or understanding that it is to enter into any particular building, is not entitled to a lien on the building in which it is used. There is no contract relation between the seller and the owner of such building. (*Van Cleve Glass Co. v. Erratt*, 383.)

2. MECHANIC'S LIEN — SUBCONTRACTOR — DEFENSE BY OWNER.—A subcontractor may acquire a mechanic's lien, although his contract, and the performance of it, do not, in all respects, conform to the agreement between the contractor and the owner. Hence, if bricks furnished by a subcontractor, and used in a building, are only "the grade known as common brick," while the agreement between the contractor and owner calls for "kiln-run" brick, which is a grade superior to common brick, yet, if the bricks furnished are reasonably adapted for such use, the owner has no defense against the subcontractor's lien except such as could have been interposed by the contractor himself. (*Wisconsin etc. Brick Co. v. Hood*, 418.)

3. MECHANIC'S LIEN.—AN INTEREST UNDER A PAROL CONTRACT TO PURCHASE LAND is not enough to make one an owner who can create a lien. (*Courtemanche v. Blackstone Valley St. Ry. Co.*, 275.)

4. MECHANIC'S LIEN.—PERSONS WHO HAVE SOLD LAND AND RESERVED THE TITLE AS SECURITY for the purchase price are not, from the fact that they know of the purpose of the purchaser to erect a building thereon, and that he is proceeding to accomplish such purpose, deemed to have consented to such building, so as to make their title subject to a mechanic's lien for work done or material furnished in its construction. (*Courtemanche v. Blackstone Valley St. Ry. Co.*, 275.)

5. MECHANIC'S LIEN.—THE ACT OR CONSENT OF THE PURCHASER OF REAL PROPERTY may relate back so as to subject it to a contract made and partially performed before he acquires title. Hence if he, after acquiring title to property upon which a building is in process of construction, consents to the subsequent completion of the contract, the effect of the consent is to include work previously done and to subject the property to a lien for work done before, as well as after, the consent thus given. (*Courtemanche v. Blackstone Valley St. Ry. Co.*, 275.)

MILLS.

1. **MILLS — APPURTENANCE — EASEMENT IN OTHER LANDS.**—If mill property is granted, an easement in other lands of the grantor, used in the enjoyment of the property, will pass by the grant as an appurtenance. (*Jarvis v. Seele Milling Co.*, 107.)

2. **MILLS — POND AND DAM — NECESSARY APPURTENANCE.**—If mill property has been granted, and a controversy arises over the grantee's right to use a pond and dam connected with the mill, the question to be determined is not whether the mill can be operated without the mill-pond, but whether its use passed as a necessary appurtenant of the mill property. (*Jarvis v. Seele Milling Co.*, 107.)

MINES AND MINING.

See Waste, 9.

MORTGAGE.

1. **AN EQUITABLE MORTGAGE ARISES** whenever a writing shows a clear agreement to make some particular property security for the debt or obligation mentioned therein. (*Dulaney v. Willis*, 815.)

2. **TRUST DEED, IMPERFECT, IS AN EQUITABLE MORTGAGE.**—A TRUST DEED purporting to be executed for the purpose of securing a specified sum, but omitting the name of the trustees, is enforceable as an equitable mortgage. (*Dulaney v. Willis*, 815.)

3. **CONVEYANCE—REGISTRATION OF, AGAINST WHOM NOT NECESSARY.**—The rights of the general creditors of a decedent are subject to all the equities enforceable against him, and therefore they cannot resist an equitable mortgage of his realty on the ground that it is not acknowledged or recorded. (*Dulaney v. Willis*, 815.)

4. **A MORTGAGE IN POSSESSION IS LIABLE FOR SUCH RENTAL AS MIGHT HAVE BEEN EARNED** by prudent management, where there has been bad faith on his part. (*Long v. Richards*, 281.)

5. **A MORTGAGEE IN POSSESSION IS LIABLE TO ACCOUNT** for such rental as might have been earned by prudent management, though he supposed he had become the owner in fee of the property by his foreclosure, if such foreclosure was fraudulent or so conducted that the parties sought to be affected by it have the right to elect to treat it as void. (*Long v. Richards*, 281.)

6. **A MORTGAGEE IN POSSESSION CANNOT, BY ANY CONVEYANCE OF THE PREMISES PENDING A SUIT** to redeem and for an accounting, relieve himself from liability to account for such rents as might have been earned by prudent management, though after the time of such transfer. (*Long v. Richards*, 281.)

7. **A MORTGAGEE IN POSSESSION IS NOT ENTITLED TO BE ALLOWED FOR PAYMENTS MADE BY HIM FOR INSURANCE** on the premises, though he had a right to insure under the mortgage, if, at the time of insuring, he claimed to have foreclosed the mortgage and to be in possession by virtue of such foreclosure, and that the title of the mortgagor had terminated, and hence, in obtaining insurance, he proceeded on his own account, wholly outside of his relations to the mortgagor. (*Long v. Richards*, 281.)

8. **MORTGAGEE IN POSSESSION—LIABILITY OF TO A SECOND MORTGAGEE.**—Upon a bill to redeem, a second mortgagee has the right to an accounting from a first mortgagee upon the

same terms as the owner of the equity, whom he represents. (*Long v. Richards*, 281.)

9. PLEADING—FORECLOSURE OF MORTGAGE—PRIOR LIEN—FEDERAL JUDGMENT—NECESSITY OF CROSS-BILL.—In a proceeding to foreclose a mortgage, where the plaintiff alleges that the defendant has or claims some interest in the mortgaged property, and the answer alleges that such interest is a prior lien, the court may, without the filing of a cross-bill, decree a foreclosure of the mortgage and order the claim of the defendant, such as a federal judgment, to be paid as a prior lien, especially where the plaintiff prays that the property be sold and the proceeds distributed according to law. (*Rock Island Nat. Bank v. Thompson*, 137.)

10. MORTGAGE, FORECLOSURE OF SECOND—POSSESSION SUFFICIENT TO SUSTAIN.—A first mortgagee cannot object that a foreclosure of the second mortgage is imperfect and ineffective because of the failure to take possession of the mortgaged premises, and to hold them peaceably for three years, if such failure was due to the fact that the first mortgagee was holding possession under a fraudulent foreclosure which the second mortgagee had the right to treat as void. (*Long v. Richards*, 281.)

11. MORTGAGES—FORECLOSURE—ALLOWANCE FOR SOLICITOR'S FEE.—If a trust deed, in the nature of a mortgage, provides for the payment of a solicitor's fee, for the mortgagee, out of a sale of the mortgaged property, the court, upon foreclosure, should allow it. (*Abbott v. Stone*, 60.)

12. MORTGAGES—FORECLOSURE—ALLOWANCE OF TAXES.—If a mortgagor fails to pay taxes as required, and they are paid by the mortgagee to protect his interest, the amount of such delinquent taxes should be allowed to him on foreclosure. (*Abbott v. Stone*, 60.)

13. MORTGAGES—DUTY TO PAY TAXES—CHANGE IN LAW.—A provision in a mortgage that the mortgagor shall pay all lawful taxes and assessments levied against the mortgaged premises, does not make him liable for taxes, which, by virtue of a subsequent change in the law, are levied against the mortgagee's interest in the premises. (*Fuller v. Kane*, 362.)

14. MORTGAGE—FRAUDULENT FORECLOSURE—ELECTION TO AVOID.—If the foreclosure of a mortgage is fraudulent, the mortgagor or a second mortgagee may elect to treat it as void, and a second mortgagee, in seeking to redeem, need not plead fraud in the foreclosure, but may proceed as if no foreclosure had been attempted; and if the defendant pleads it, the complainant may rely on his general denial in his replication. (*Long v. Richards*, 281.)

15. MORTGAGE—FRAUD IN FORECLOSURE—EVIDENCE SUFFICIENT TO ESTABLISH.—The finding of fraud in foreclosing a mortgage is sustained by evidence showing that the principal debt was not due, that the default relied upon was in the payment of six months' interest, that the plaintiff made nine attempts to pay without being able to find the defendant's lawyer in his office, that the sale was advertised in the month when the interest fell due, and no notice was given to plaintiff, that the notice of sale stated the premises to be subject to a large mortgage, which in fact had been paid and released, and the sale took place on a deserted beach at 4 o'clock of a November afternoon, no bidder being present except an agent of the foreclosing mortgagee. (*Long v. Richards*, 281.)

16. MORTGAGEE AFTER A FRAUDULENT FORECLOSURE, WHEN CHARGEABLE AS A MORTGAGEE IN POSSESSION.—If the holder of a first mortgage forecloses it by proceedings which

the mortgagor has the right to avoid as fraudulent, but he does not do so, a second mortgagee may proceed against the first as a mortgagee in possession and compel him to account as such. (*Long v. Richards*, 281.)

17. PAYMENT—APPLICATION OF—MORTGAGEE'S DUTY AS TO.—If the owner of mortgaged property executes a note and mortgage and places the papers in the hands of his agents to negotiate a loan and to apply its proceeds to the payment of the prior mortgages and of debts for improvements not yet completed, the mortgagee is not required to see that the agents apply the money as directed, but he has a right to purchase the prior mortgages, and, if he does so, such purchase is not a satisfaction of them. (*Seaverns v. Presbyterian Hospital*, 125.)

See *Receivers*, 7.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—STATUTORY CONSTRUCTION OF POWER CONFERRED.—A statute conferring powers upon a municipality is presumed to have been framed and adopted with reference to the rule that nothing is to be taken by intendment in construing a legislative grant of power, and this rule is not rendered inapplicable because the powers delegated cannot be exercised by the legislature directly. (*Detroit etc. Ry. Co. v. Detroit*, 350.)

2. NUISANCE—POWER OF MUNICIPALITY TO DECLARE.—General power given to a city to declare what are nuisances does not empower it to declare that a nuisance which is not so in fact. (*St. Louis v. Heitzeberg Packing etc. Co.*, 516.)

3. MUNICIPAL ORDINANCES TO BE VALID, must fix the duty or liability of the citizen by certain and intelligibly prescribed rules, so that he may govern himself accordingly; and if they leave the manner of their enforcement to unregulated official discretion they are void. (*St. Louis v. Heitzeberg Packing etc. Co.*, 516.)

4. MUNICIPAL CORPORATIONS—POWER TO DETERMINE WHAT IS NEGLIGENCE.—A city is not clothed with power to determine when, or under what circumstances, a street-car company shall be deemed negligent so as to authorize a recovery by a person injured. (*Rockford City Ry. Co. v. Blake*, 122.)

5. MUNICIPAL CORPORATIONS.—THE POWER TO IMPRISON must be plainly given or it does not exist, and, when given, before it can be exercised, there must be a judicial ascertainment, by a competent tribunal or magistrate, of the guilt of the accused. The authority given to a municipal corporation to impose a fine does not include the power to imprison for its nonpayment. (*Bolton v. Vellines*, 737.)

6. CRIMINAL LAW—FINES—ENFORCEMENT OF BY IMPRISONMENT.—Where a municipal corporation is given authority to enact by-laws and to enforce obedience to them by fines, it is limited to the mode prescribed, and cannot imprison nor authorize imprisonment. (*Bolton v. Vellines*, 737.)

7. CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—The acceptance by the people of a city of a statute authorizing the establishment of public libraries by cities does not operate as an assent by them to the provisions of a subsequent statute which is unconstitutional as delegating the taxing power to boards of trustees of such libraries. (*State v. Mayor etc. of Des Moines*, 157.)

8. STATUTES—GENERAL AND LOCAL LAWS—CLASSIFICATION.—Although population may be made the basis of classifica-

tion in statutes relating to municipal bodies, such classification cannot be made the means of evading the constitutional interdict against local or special laws. The question whether any particular statute is local or special must be determined not upon its compliance with legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law. (*Wanser v. Hoos*, 600.)

9. **STATUTES — MUNICIPAL GOVERNMENT.** — Classification on the basis of population in statute relating to the machinery and powers of municipalities is legitimate, if such population bears a reasonable relation to the necessities of such municipalities. Classification is in such cases necessarily committed to the judgment of the legislature, and such judgment must prevail, unless the classification is plainly illusory or applied illusively. (*Wanser v. Hoos*, 600.)

10. **MUNICIPAL CORPORATIONS — STREETS — RIGHT TO CONTROL.**—A constitutional provision that the state shall not be interested in any work of internal improvement, nor vacate nor alter any road laid out by highway commissioners, nor any city street, does not take from the legislature and confer upon municipalities the absolute and supreme power over streets. (*Detroit etc. Ry. Co. v. Detroit*, 350.)

11. **STREETS AND HIGHWAYS. — ABUTTING OWNERS HAVE A RIGHT** appurtenant to their property of access to it from the adjacent streets and alleys, and this right is as inviolable as their right to their property. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

12. **STREETS AND HIGHWAYS — ADDITIONAL SERVITUDES.**—The conversion of a single track horse-car railway into a double track electric railway is not the imposition of an additional servitude upon a street, for which abutting property-owners are entitled to compensation, or which may be enjoined at their instance. (*Reid v. Norfolk City Ry. Co.*, 708.)

13. **STREETS AND HIGHWAYS—AN ADDITIONAL SERVITUDE OR BURDEN FOR WHICH PROPERTY-OWNERS ARE ENTITLED TO COMPENSATION** is not created by the construction and operation of an electric railway upon a city street. (*Reid v. Norfolk City Ry. Co.*, 708.)

14. **STREETS AND HIGHWAYS—RAILROADS, EXTENT TO WHICH MAY BE AUTHORIZED TO USE.**—Although the construction and operation of a steam railroad in a public street may be authorized without imposing an additional servitude, and hence without entitling abutting property owners to compensation, this rule is wholly inapplicable where such construction or operation must destroy the use of the street or highway as a public thoroughfare or unreasonably interfere with the right of abutting property owners to have access to, and egress from, their property to such street or highway. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

15. **STREETS AND HIGHWAYS.**—The laying and operating of a railroad in a public street for a private use cannot be authorized by a municipality. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

16. **MUNICIPAL CORPORATIONS — EASEMENTS IN STREETS.**—The power of a municipality to grant an easement in streets to a street railway company is not inherent, but is derived solely from the legislature. (*Detroit etc. Ry. Co. v. Detroit*, 350.)

17. **MUNICIPAL CORPORATIONS — POWER TO GRANT EASEMENT IN STREETS.**—A municipality has no power to grant exclusive rights in streets to street railway or other corporations

except upon authority from the legislature, given explicitly, and clearly expressed. In construing charters and statutes conferring such power, the authority to grant exclusive privileges cannot be implied from the use of general language. (*Detroit etc. Ry. Co. v. Detroit*, 350.)

18. **STREETS AND HIGHWAYS—PRIVATE USE OF RAILROADS, WHAT IS NOT.**—A railroad switch track constructed in a public alley by authority of a city and connected with the main line of, and operated by, a railway corporation is not for a private, but for a public, use, where the control of the cars and the business of transportation is not by the merchants who are served by such switch, but is in such corporation. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

19. **STREETS AND HIGHWAYS.—THE EXCLUSIVE USE OF A STREET OR HIGHWAY** cannot, by a municipal corporation, be granted to any one person or corporation. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

20. **MUNICIPAL CORPORATIONS—STREETS—EXCLUSIVE FRANCHISE IN.**—A municipal ordinance granting to a street railroad company the exclusive right to construct and operate a railway upon certain streets and to construct such new lines as the city council may from time to time determine, is an attempted grant of an exclusive privilege, although reserving the right to grant to other companies the privilege of operating upon such streets in case the first company fails to extend its lines to streets designated by such council. (*Detroit etc. Ry. Co. v. Detroit*, 350.)

21. **MUNICIPAL CORPORATIONS—STREETS—EXCLUSIVE FRANCHISES IN.**—Power to grant exclusive privileges to occupy streets for street railways is not conferred upon a municipality by a statute providing that "all companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." (*Detroit etc. Ry. Co. v. Detroit*, 350.)

22. **STREETS AND HIGHWAYS, RAILWAYS IN, WHEN IMPOSE AN ADDITIONAL SERVITUDE.**—Although the laying of a railway track on the established grade and operating a steam railway thereon do not subject a street to a servitude different from that contemplated in the original dedication, the rule is subject to the qualification that the street cannot be used for sidetracks, water tanks, and like structures. (*Sherlock v. Kansas City Belt Ry. Co.*, 551.)

23. **MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—RIGHT OF ACTION FOR DAMAGES.**—A city or town does not injure a lotowner by establishing the grade of a street on paper, but does injure him when such grade is applied to the ground. It is the direct physical disturbance of a right which the owner had enjoyed in connection with his property that gives a cause of action. (*Blair v. Charleston*, 837.)

24. **MUNICIPAL CORPORATIONS—STREETS—WHAT CHANGE OF GRADE ENTITLES OWNER TO DAMAGES.**—A lotowner is entitled to consequential damages from a change of the natural surface of a street to a legally established grade, for a change from the natural grade is a change of grade, just as much as a change from a grade previously established by the authorities. (*Blair v. Charleston*, 837.)

25. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—LIABILITY FOR DAMAGES.—If the grade of a street has been actually established, and improvements on property have been made with reference to such grade, and the grade is changed by raising or depressing it, and injury results to the property, the municipality must, under a constitutional provision that private property shall not be taken or "damaged" for public use without just compensation, answer for such damage, though the work was free from negligence. (*Blair v. Charleston*, 837.)

26. MUNICIPAL CORPORATIONS—STREETS—DAMAGES FOR CHANGE OF GRADE.—A constitutional provision that private property shall not be taken or "damaged" for public use without just compensation does not limit a lotowner, who claims damages occasioned by a change of street grade, to injuries caused by an enlargement or alteration of the street, but covers the whole scope of injury and includes any act working the injury. (*Blair v. Charleston*, 837.)

27. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—IN ESTIMATING DAMAGES to property caused by a change of street grade, it is proper to consider the expense of adjusting the property to the new grade, the cost of filling, injury to trees, and the raising of houses, where the damage to houses is included. In fact, all things causing a diminution in the value of the property are to be considered, for the question is, What is the actual loss to the market value of the property? (*Blair v. Charleston*, 837.)

28. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—THE MEASURE OF DAMAGES for an injury to property arising from a change of a street grade line is such a sum as will make the owner whole; that is, the depreciation of the market value caused by the change of grade. If the fair market value is as much immediately after the change of grade as immediately before, no damages can be recovered. (*Blair v. Charleston*, 837.)

29. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE BEFORE ESTABLISHMENT OF GRADE LINE—DAMAGE TO LOT.—If a street of a city or town is a public street, though no grade for it has ever been fixed by the municipality, and is used upon the natural surface grade for any considerable time, and improvements have been made on lots lying upon it, with reference to such grade, before any grade line is established, and the natural surface grade is changed to the injury of such lots, the municipality is answerable therefor in damages. (*Blair v. Charleston*, 837.)

30. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE AFTER ESTABLISHMENT OF GRADE LINE BUT BEFORE ACTUAL GRADING—DAMAGE TO LOT AND BUILDING. If one purchases a lot in a city or town, on the natural surface grade of a street, after the municipality has established a grade line, on paper, but before an actual grading to make the street conform to that line, he may recover damages for an injury to his lot caused by such actual grading, but cannot recover damages for an injury to a building erected thereon after the paper grade was adopted, as the building must conform to the grade line. (*Blair v. Charleston*, 837.)

31. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—SETOFF OF BENEFITS AGAINST DAMAGES.—In allowing damages to a property-owner for injuries caused by a change of street grade, special or peculiar benefits to his property must be set off against the damages. (*Blair v. Charleston*, 837.)

32. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.—"PECULIAR BENEFITS" to property affected by a

change of street grade are those which particularly and exclusively affect the particular property, and include special benefits arising from an enhancement of value. All benefits to the property, local or "general," by which its market value is kept up or increased, are necessarily to be considered, though other "general" benefits are not to be. (*Blair v. Charleston*, 837.)

33. MUNICIPAL CORPORATIONS—SURFACE WATER—DUTY AND LIABILITY.—A municipal corporation has no right, by any means whatever, to collect surface water and cast it in a body upon the land of a lotowner, and is answerable in damages if it does so. (*Clay v. St. Albans*, 883.)

34. MUNICIPAL CORPORATIONS—DRAINS AND GUTTERS—SURFACE WATER—INJURY—LIABILITY.—A city or town must keep its drains and gutters open and clear of obstructions, so that water in them will flow off, and is answerable in damages for its negligence in allowing them to become choked and clogged up, where injury is thereby caused to a lotowner from an overflow of surface water, except when it is due to an unusual storm or flood. (*Clay v. Albans*, 883.)

35. NUISANCE—MUNICIPAL ORDINANCE.—A city ordinance which makes no reasonable allowance for the regulation of "dense black" or "thick gray" smoke, but essays in advance of any known device for preventing it, to punish, as for a nuisance, all who produce it to any degree whatever, is unreasonable and void. (*St. Louis v. Heitzberg Packing etc. Co.*, 516.)

See Officers, 13; Statutes, 3, 9, 10; Taxes, 1; Witnesses 3.

MUTUAL BENEFIT SOCIETIES.

See Insurance.

NAMES.

NAMES—IDEM SONANS—NOTICE BY PUBLICATION.—The name "Keesel" in a summons, when service in an action for divorce against a nonresident is by publication, cannot be assumed to be understood as the same as "Keisel," the defendant's real name and a default decree based on such service is void. (*Hubner v. Reickhoff*, 191.)

NEGLIGENCE.

1. NEGLIGENCE—THE QUESTION OF NEGLIGENCE IS FOR THE JURY when the facts are in dispute, and also when they are indisputable, but intelligent and fair-minded men may reasonably differ as to the conclusions to be drawn therefrom. It is otherwise when the facts are not in dispute and are susceptible of but one conclusion. (*Watson v. Portland etc. Ry. Co.*, 268.)

2. NEGLIGENCE—DAMAGES—QUESTIONS OF FACT.—Whether an injury was received as charged in the declaration, and the amount of damage, are questions of fact. (*Hartford Deposit Co. v. Sollitt*, 35.)

3. NEGLIGENCE—QUESTION OF LAW OR FACT.—If only one inference can be drawn from a given state of facts, then, whether they constitute negligence is a question of law, but, if the facts are susceptible of more than one inference, then the question of negligence is one of fact for the jury to determine under proper instructions. (*Wade v. Columbia Electric Street Ry. etc. Co.*, 676.)

4. NEGLIGENCE—QUESTION OF LAW OR FACT.—What constitutes ordinary diligence or care in a given case is always a question of fact to be determined by the jury, in view of surrounding circumstances, when there is substantial evidence upon which to

submit such an issue, but, in the absence of such evidence, it becomes a question of law to be determined by the court. (*American Brewing Assn. v. Talbot*, 538.)

5. NEGLIGENCE—PLEADING.—A recovery for negligence cannot be had upon a ground not alleged in the declaration. (*Mitchell v. Prange*, 329.)

6. NEGLIGENCE—PLEADING—PROOF.—When the necessary primary facts are given in a declaration for negligence, all other facts which are merely incidental to, and evidence of, such primary facts may be proved though they are not pleaded. (*Snyder v. Wheeling Electrical Co.*, 922.)

7. NEGLIGENCE — PLEADING — WHAT SHOULD BE STATED.—A declaration for negligence should state the main or primary facts, without particularly detailing all the evidential facts of negligence. The pleader may say that the defendant negligently did, or did not, do so and so, but he must state the facts which constitute the basis of liability. (*Snyder v. Wheeling Electrical Co.*, 922.)

8. NEGLIGENCE — PLEADING — WHAT NEED NOT BE STATED.—While it is not, as a general rule, necessary, in a declaration for negligence, to state the particular acts which constitute negligence, yet detail must be given, if negligence cannot be otherwise charged. (*Snyder v. Wheeling Electrical Co.*, 922.)

9. ELECTRIC LIGHT COMPANIES — NEGLIGENCE — INSTRUCTIONS.—If a prima facie case of negligence against an electrical company is made out, instructions which ignore it are properly refused, but instructions leaving it to the jury to say whether the injury was caused by unavoidable accident are improperly refused if the circumstances point to that as the cause. (*Snyder v. Wheeling Electrical Co.*, 922.)

10. NEGLIGENCE—PRIMA FACIE CASE.—There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. (*Snyder v. Wheeling Electrical Co.*, 922.)

11. NEGLIGENCE—PRECAUTION.—It is not negligence to fail to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not have happened but for the occurrence of exceptional circumstances. (*American Brewing Assn. v. Talbot*, 538.)

12. NEGLIGENCE—WHAT IS NOT.—It is not negligence to fail to refill a trench dug for a sewer before exploding a blast therein, in the absence of evidence showing that that was the proper, or usual, or reasonable thing to do. (*Mitchell v. Prange*, 329.)

13. NEGLIGENCE—BLASTING—NOTICE.—When a business requiring blasting has been conducted for several weeks in the near vicinity of a resident with his knowledge that blasts were of frequent occurrence, it is not negligence to fail to notify such resident of each intended blast. (*Mitchell v. Prange*, 329.)

14. NEGLIGENCE — BLASTING — CONSTRUCTION OF CONTRACT.—A provision in a contract for the construction of a sewer, requiring the contractor, when "blasting is necessary, to cover the blast with brush or timber sufficiently to prevent injury to persons

or property," is for protection from injury by fragments which might otherwise be thrown from the sewer trench, and does not reach the case of one injured by a horse frightened by an explosion of a blast. (*Mitchell v. Prange*, 329.)

15. BICYCLES—NEGLIGENCE OF RIDER.—A bicycle is a vehicle, and if a bicyclist passes a pedestrian on the same road going in the same direction, the bicyclist is liable for damage resulting to the pedestrian from a collision between them, provided the pedestrian is without fault. (*Meyers v. Hinds*, 345.)

16. BICYCLIST—NEGLIGENCE OF.—One riding a bicycle down a narrow path at the rate of five or six miles an hour without giving warning of his approach when the path is occupied by many pedestrians going in the same direction, is guilty of negligence, and not relieved from liability for running into a pedestrian by the fact that the collision occurred from the bicyclist striking an obstacle, which it is not shown that he could not have avoided in the exercise of due and reasonable care. (*Meyers v. Hinds*, 345.)

17. BICYCLES—NEGLIGENCE—BURDEN OF PROOF.—If one riding upon a bicycle comes up behind another, who is walking where he has a right to walk, and is unconscious of the approach of the bicyclist, who, without giving any warning, strikes him with his vehicle, those facts, unexplained, tend to show negligence, and cast the burden of proof upon the bicyclist to show that he was in the exercise of due care. (*Meyers v. Hinds*, 345.)

See Electric Companies, 2-4; Elevators, 3, 4; Evidence, 13; Master and Servant, 12-14, 16; Municipal Corporations, 4; Railroad Companies; Warehousemen, 1, 2.

NEGOTIABLE INSTRUMENTS.

1. DEFINITIONS—MONEY.—BILLS OF EXCHANGE are not money, and commercial usage, whereby they are regarded as money, cannot make them such. (*First Nat. Bank v. Slette*, 429.)

2. NEGOTIABLE INSTRUMENTS—WHAT ARE NOT—PAYMENT IN BILLS OF EXCHANGE.—An instrument in the general form of a promissory note, but made payable by bills of exchange, instead of in money, is not a promissory note, and is not negotiable. (*First Nat. Bank v. Slette*, 429.)

3. NEGOTIABLE INSTRUMENTS—ATTORNEYS' FEES.—A note for a sum specified and attorneys' fees is not a negotiable instrument. (*Roads v. Webb*, 246.)

4. NEGOTIABLE INSTRUMENTS.—If a note purports to be payable on or before a specified date, this uncertainty in the time of payment destroys its negotiability in some of the states, but not in others. (*Roads v. Webb*, 246.)

5. NEGOTIABILITY OF INSTRUMENTS, BY WHAT LAWS CONTROLLED.—Though an instrument is deemed negotiable by the law of Indiana, in which state it was executed and negotiated, the courts of Maine will not, in an action thereon in that state, follow the decisions of Indiana, where they are dependent upon the determination of what were the common-law rules applicable to the subject. (*Roads v. Webb*, 246.)

6. NEGOTIABLE INSTRUMENTS—PRESUMPTION IN FAVOR OF THE TRANSFEREE.—When a negotiable promissory note is transferred before maturity, the presumption is, that the transferee takes it in good faith and without notice of secret claims or trusts in favor of third parties, or that the note was without consideration. (*Borgess Investment Co. v. Vette*, 567.)

7. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—BURDEN OF PROOF.—If, in an action on a note by a pur-

chaser thereof, there is proof of fraud in the inception of the note, the burden of proving a bona fide purchase is upon the holder, but, if he in the first place makes a prima facie case of bona fide purchase, evidence of such fraud is not admissible until such prima facie case is attacked by evidence raising a question of fact in relation thereto. (*Drovers' Nat. Bank v. Blue*, 327.)

8. NEGOTIABLE INSTRUMENTS.—MERE SUSPICION ON THE PART OF AN ASSIGNEE OF A NEGOTIABLE NOTE that it was made without consideration is not sufficient to deprive him of the right to be treated as a bona fide purchaser thereof. This principle is as applicable to a suit in equity as to an action at law. (*Borgess Investment Co. v. Vette*, 567.)

9. TRUST DEEDS—RIGHTS OF ASSIGNEE OF NOTES SECURED BY.—An assignee of a negotiable promissory note secured by a deed of trust, acquiring title before maturity, is entitled to enforce such deed of trust free from all defenses except such as can be made against the note. The assignee is not affected by subsequent notice of the defenses or equities of other parties. (*Borgess Investment Co. v. Vette*, 567.)

10. NEGOTIABLE INSTRUMENTS.—ACCOMMODATION INDORSERS may withdraw their names from a note at any time before it is actually negotiated. (*Greenville v. Ormand*, 663.)

11. NEGOTIABLE INSTRUMENTS PAYABLE ON DEMAND—LIABILITY OF INDORSERS.—If a note is given, payable on demand, without interest, and is indorsed before its delivery, and the consideration is advances to be made, a demand of payment made fourteen months after the last advancement is not within a reasonable time, and the indorser cannot be held liable thereon. (*Wylie v. Cotter*, 305.)

12. NEGOTIABLE INSTRUMENTS — INDORSEMENT BY PAYEE—WHEN AMOUNTS TO A SALE ONLY.—If notes are sold by the payee for much less than their face value, and the indorsee does not, for a long time after they fall due and are dishonored, make any claim that the vendor is liable as indorser, the court should find that it was the understanding of the parties that the indorsement was only for the purpose of transferring the title and without intending that the purchaser should be liable upon his indorsement. (*Roads v. Webb*, 246.)

13. NEGOTIABLE INSTRUMENTS—INDORSEMENT—PAROL EVIDENCE TO VARY.—Where a note negotiable on its face is indorsed in blank by a payee, parol evidence is admissible to show an agreement between the parties that the endorser will not be holden. (*Roads v. Webb*, 246.)

14. NEGOTIABLE INSTRUMENTS—EVIDENCE.—In an action on a note by a holder for value, a conversation between the makers thereof at the time of execution is not admissible in evidence, unless communicated to the holder before purchase by him. (*Greenville v. Ormand*, 663.)

15. NEGOTIABLE INSTRUMENTS—EVIDENCE.—In an action on a note by the holder against the principal and sureties, conversations between the indorser and the payee, made in the presence of the payer as to the negotiation of the note, are admissible in evidence, although the sureties were absent at the time the conversation was had. (*Greenville v. Ormand*, 663.)

16. NEGOTIABLE INSTRUMENTS—WHEN DISHONORED.—If a note is indorsed before maturity, it is dishonored paper at the time of the indorsement, if interest is then overdue on it and unpaid, and this fact is known to the purchaser. The note, in his hands, is, therefore, subject to all equities between the original parties, for

he is not a bona fide purchaser without notice. (*First Nat. Bank v. Forsyth*, 415.)

17. **NEGOTIABLE INSTRUMENTS—RELEASE OF SURETIES.**—The holder of a note for value, with notice of its execution by sureties to enable the payee to discount it, and that the latter indorsed it without consideration, cannot enforce it against the sureties. (*Greenville v. Ormand*, 663.)

18. **NEGOTIABLE INSTRUMENTS—GUARANTY FOR COLLECTION—ACTION—BURDEN OF PROOF.**—If a note is executed in a sister state, by a resident of that state, and the collection of it is guaranteed in this state, but the maker removes from that state into another before the note falls due, the holder here may resort to his action on the guaranty without pursuing the maker, and all that is necessary for him to prove is, that the maker left such sister state before the maturity of the note. If the maker left any property in that state out of which the note might be collected, the burden is on the defendant guarantor to prove it. (*Fall v. Youmans*, 390.)

NOTICE.

NOTICE FROM TITLE PAPERS.—It is the duty of a purchaser to look to the title papers under which he buys. If he closes his eyes to this source of information, he does so at his peril. Hence, one whose title is dependent upon a decree in partition is chargeable with notice of owelty required by it to be paid, and which is a lien on one of the parcels set off to be held in severalty. (*Jameson v. Rixey*, 726.)

See Corporations, 4, 5, 13.

NUISANCE.

1. **NUISANCE—SMOKE ALONE** is not a nuisance under the common law, and when not declared to be such by statute, it cannot be deemed to be a nuisance until shown to be such by clear and convincing proof. (*St. Louis v. Heitzeberg Packing etc. Co.*, 516.)

2. **NUISANCE, PUBLIC.**—A PRIVATE PERSON suing either in his own behalf, or on behalf of himself and others, cannot obtain an injunction against a public nuisance, unless he has suffered, or will suffer, some special damage not suffered by the general public. (*Taylor v. Portsmouth etc. Street Ry.*, 216.)

3. **NUISANCE AS BETWEEN LESSOR AND LESSEE.**—To constitute a thing a nuisance as between a lessor and a lessee and the servants of the latter, it must itself work some unlawful peril to the health or safety of persons or property. It is not sufficient to constitute it a nuisance that, upon being employed for some purpose for which it was intended, it proved to be inadequate, and, through its weakness, caused injury to the lessee or his servants. (*Whitmore v. Orono Pulp etc. Co.*, 229.)

See Municipal Corporations, 2, 35.

OBSCENE PICTURES.

See Indecency.

OFFICERS.

1. **OFFICERS—DE FACTO—VALIDITY OF ACTS—POWER TO APPOINT.**—If an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of

such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so. (*Erwin v. Mayor*, 584.)

2. **OFFICERS DE FACTO—RIGHT TO COMPENSATION.**—One who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover the compensation provided by law for such services during the period for which they have been rendered. (*Erwin v. Mayor*, 584.)

3. **OFFICERS—APPOINTMENT—VETO OF MAYOR.**—Under a city charter giving power to the mayor to veto the "acts" of any municipal board and requiring all ordinances and resolutions to be sent to him for consideration, the approval of the mayor is not required to validate an appointment to office by a municipal board. "Acts" which the mayor may veto or approve are those of a legislative character only. (*Erwin v. Mayor*, 584.)

4. **POLICE COMMISSIONERS ARE NOT JUDICIAL OFFICERS.** Hence they are liable for directing the arrest and imprisonment of a citizen upon a charge which does not constitute a crime, or if it does constitute a crime, is not punishable by arrest and imprisonment. (*Bolton v. Vellines*, 737.)

See Counties.

ORIGINAL PACKAGE.

See Interstate Commerce, 2-4.

OWELTY.

See Limitations of Actions, 1; Notice; Partition.

PARTIES.

PARTIES—WHO ARE INDISPENSABLE IN SALE OF FEE.—In a chancery suit to sell the fee of land, not only the owner of the particular estate, but also the owners of the first vested estate, in reversion or remainder, if any, are indispensable parties; and a decree of sale will not affect, or pass, the rights of the remaindermen, if they are not made parties. The appearance of a life tenant as a party, or of a trustee holding for the remaindermen, cannot make the remaindermen parties by representation. (*Williamson v. Jones*, 891.)

PARTITION.

1. **PARTITION IS A MATTER OF RIGHT**, and hence may be compelled though the land sought to be partitioned is subject to a right of way which cannot be destroyed by the partition. The purchase of the land in common while subject to the easement of a passageway belonging to the purchasers does not raise an implication that the purchasers agreed to hold it in common, nor does it render partition inequitable. (*Crocker v. Cotting*, 278.)

2. **LACHES CANNOT BE IMPUTED TO A PERSON IGNORANT OF HIS RIGHTS.**—Hence, a woman in whose favor owelty in partition was decreed will not be precluded by laches from asserting such decree, if it appears that, until a short time before the commencement of the present suit, she was not aware that such owelty had been awarded to her. (*Jameson v. Rixey*, 726.)

3. **COTENANTS—IMPROVEMENTS.—AN ACTION OF ASSUMPSIT CANNOT BE MAINTAINED** by one cotenant against another for improvements placed upon the common property by the plaintiff without the consent of the defendant, in the absence of any promise made by him to pay therefor. The remedy to obtain com-

pensation for such improvements can be asserted only in a suit for partition. (Ballou v. Ballou, 733.)

4. **COTENANTS — IMPROVEMENTS — AGREEMENT FOR—STATUTE OF LIMITATIONS.**—In a suit for partition, the claim of one of the cotenants for compensation for improvements made by him cannot be barred by the statute of limitations. (Ballou v. Ballou, 733.)

5. **COTENANTS—IMPROVEMENTS—RIGHT TO RECOVER FOR IN PARTITION.**—A cotenant improving the common property at his own expense can, in a partition suit, have compensation, though his cotenant did not consent to the improvement nor promise to pay therefor. An allowance for compensation for improvements is in all cases made, not as a matter of legal right, but purely from the desire of the court to do justice, and must be estimated so as to involve no injury of the cotenant against whom the improvements are chargeable. (Ballou v. Ballou, 733.)

6. **A JUDGMENT FOR OWELTY** in a suit for partition, though it purports to be against the parties personally, does not merge the lien or release the land from it. (Jameson v. Rixey, 726.)

7. **PARTITION.—A LIEN FOR OWELTY** of partition partakes of the nature of a vendor's lien and follows the land into the hands of subsequent purchasers thereof. (Jameson v. Rixey, 726.)

8. **PARTITION—OWELTY DOES NOT CONSTITUTE A PERSONAL CLAIM**, and a decree undertaking to impose a personal obligation for it is erroneous. (Jameson v. Rixey, 726.)

9. **A LIEN FOR OWELTY OF PARTITION** is not released by taking the personal obligation of another or by other security for its payment, nor is it merged by a judgment or decree therefor, but subsists until it is clearly shown to have been waived, released, or satisfied. (Jameson v. Rixey, 726.)

See Limitations of Actions, 1; Notice.

PARTNERSHIP.

See Building and Loan Associations, 1, 2; Lotteries, 1.

PARTY-WALLS.

PARTY-WALLS—AGREEMENT—COVENANTS RUNNING WITH THE LAND.—Contracts with reference to party-walls should be construed with a view to carry out the purpose and intent of the parties. If two adjoining owners, therefore, enter into a contract by which one agrees to build a party-wall, and the other covenants to pay his proportion when he uses it, but it is agreed, for the mutual benefit of the parties, that, in all deeds and transfers, the wall shall be reserved as a partition wall, that it shall be kept in good condition and repair at the expense of both parties, each paying share and share alike, and that the wall and the conditions imposed are to be permanent—such contract is not merely a personal one between the parties, but benefits and burdens arise from such covenants, are inseparably connected therewith, and necessarily pass, according to the manifest intention of the parties, to a grantee of the land. Hence, such covenants run with the land and do not give a cause of action, upon a breach thereof, in favor of one of the owners who has parted with his interest in the land. (Kimm v. Griffin, 385.)

PAYMENT.

1. **PAYMENT—PRESUMPTION OF.**—Payment will be presumed after the lapse of twenty years, but may be inferred from circumstances tending to support it within a less period, but such presump-

tion may be rebutted by evidence showing that payment has not in fact been made. (*Jameson v. Rixey*, 726.)

2. PAYMENT — APPLICATION OF DUTY — TRUST — AGENCY.—A case in which the owner of property executes a mortgage and gives it to his agents to negotiate a loan and to receive the money is not a case of trust, but one of agency, and the equitable principle that a mortgagee must, under some circumstances, see to the application of the money loaned, does not apply to it, especially where the money is to be applied by the agents to certain purposes requiring, on their part, time, deliberation, and discretion, such as the payment of a particular debt, or debts not ascertained when the money is paid over, or debts to arise in the future. (*Seaverns v. Presbyterian Hospital*, 125.)

PERPETUITIES.

See Devise, 2; Estates, 5-7; Landlord and Tenant, 8, 9; Powers, 2; Wills, 12, 13.

PETROLEUM OIL.

See Estoppel, 6; Estates, 8; Real Property, 1, 3; Waste, 4-9.

PLEADING.

1. ONE WHO RELIES UPON THE STATUTE OF FRAUDS must ordinarily rely upon it in his pleadings. (*Robertson v. Smith*, 723.)

2. MOTIONS—THE LAWS OF ANOTHER STATE WHICH ARE RELIED UPON BY A MOVING PARTY need not be pleaded nor referred to in the notice of the motion. It is sufficient that the notice of the motion is such that the defendant cannot mistake its object. If he desires more specific information, his remedy is to move the court to order the plaintiff to file a statement of the particulars of his claim. (*Union etc. Ins. Co. v. Pollard*, 715.)

3. PLEADING OF TITLE—WHAT IS SUFFICIENT.—In an action for an injury to a present estate in real or personal property, the declaration must show title, but an allegation of possession by the plaintiff is a sufficient pleading of title. (*Clay v. St. Albans*, 883.)

4. PLEADING—AVERMENT OF SEISIN AND POSSESSION.—An allegation of seisin and possession of a lot of land, though it does not say of what estate the plaintiff is seised and possessed, imports some immediate, present estate, not a future one, and is a sufficient allegation of possession in an action of trespass on the case. (*Clay v. St. Albans*, 883.)

See Attachment, 1; Imprisonment, 1; Insurance, 5; Judgment, 7, 8; Limitations of Actions, 3, 4; Negligence, 5-8; Trial.

POLICE COMMISSIONERS.

See False Imprisonment, 2; Officers, 4.

POLICE POWER.

1. POLICE POWER.—LAWS ENACTED IN THE EXERCISE of the police power must be police regulations in fact, and if they do not conduce to any legitimate police purpose, but amount to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, they must be declared unconstitutional. (*State v. Chicago, Milwaukee etc. Ry. Co.*, 482.)

2. POLICE POWER—TO WHAT EXTENT MAY BE EXERCISED.—If a business is a proper subject of police regulation the

legislature may, in the exercise of that power, adopt any measures they see fit, provided only that they adopt such as have some relation to, and have some tendency to accomplish, the desired end; and if such measures have been adopted, and do not violate some provision of the constitution, the courts cannot assume to determine whether they are wise or the best that might have been adopted. (State v. Chicago, Milwaukee etc. Ry. Co., 482.)

3. **POLICE POWER.—PUBLIC STORAGE AND WAREHOUSE BUSINESS** is subject to the police power of the state to adopt such reasonable regulations as the legislature may deem necessary for the protection of the public who intrust their property to those carrying on such business. (State v. Chicago, Milwaukee etc. Ry. Co., 482.)

4. **POLICE POWER—WAREHOUSEMEN—COMMON CARRIERS.**—It is within the police power of the state to adopt any reasonable regulations for the preservation and protection of property which has been transported to its place of consignment by a common carrier, and is abandoned, or not claimed within a reasonable time, by the consignee or owner. (State v. Chicago, Milwaukee etc. Ry. Co., 482.)

5. **POLICE POWER—WAREHOUSEMEN—CARRIERS.**—The police power, when exercised over carriers or warehousemen, must be confined to such restrictions and burdens as are necessary to promote the public welfare, or, in other words, prevent the infliction of a public injury. (State v. Chicago, Milwaukee etc. Ry. Co., 482.)

6. **POLICE POWER—REGULATION OF CARRIERS.**—A statute requiring railways and transportation companies to turn over to a licensed storage company or public warehousemen all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional, and not a legal exercise of the police power. (State v. Chicago, Milwaukee etc. Ry. Co., 482.)

See Interstate Commerce, 1, 5.

POWERS.

1. **A POWER OF SALE CANNOT BE EXERCISED AFTER THE NECESSITY FOR IT HAS CEASED.**—Therefore, if a testator authorizes his executors, at the death of his widow, to sell his property and divide it among his children, but, at the time of his wife's death, none of the children survive, the power is extinguished, because there is no longer any necessity to sell to effect the testator's purpose to divide the property among his children. (Rudy's Estate, 654.)

2. **PERPETUITIES—POWERS OF SALE, WHEN OFFEND THE RULE AGAINST.**—If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. This happens when the donee of the power and the occasion on which it can be exercised by both, by possibility, be in existence beyond the limits of the rule. (Johnston's Estate, 621.)

PRESUMPTIONS.

See Appeal, 2; Bigamy, 1; Burglary, 3; Contracts, 3; Corporations, 2; Indictment; Judicial Sales, 3; Negotiable Instruments, 6; Payment, 1.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PROCESS.

PROCESS—SERVICE OF—SETTING ASIDE.—In a civil action, service of process upon a defendant who is brought into the territorial jurisdiction of the court by fraudulent means or criminal process may be set aside, if timely objection is made thereto. (*Holker v. Hennessey*, 524.)

See Execution, 5.

PUNISHMENT.

See Criminal Law, 1; Municipal Corporations, 5, 6.

RAILROAD COMPANIES.

1. RAILROAD FRANCHISES are made for the benefit of the public; and where the conditions upon which they are allowed to be created are voluntarily violated by the grantee, and it is impracticable or impossible to recover compensation in damages, the grant may be annulled and the franchises forfeited as provided for in the grant. (*Tower v. Tower etc. Street Ry. Co.*, 493.)

2. RAILROADS — FORFEITURE OF FRANCHISE.—If a city grants to a street railway company a franchise to construct, maintain, and operate a street railway on its streets, upon condition that if such company should fail to build or willfully abandon such road, and neglect or refuse to operate it, the franchise shall become null and void, and the company agrees to "forfeit" the road to the city in one year after it ceases to operate it, the word "forfeit" is not to be construed as providing for a nonenforceable penalty nor for liquidated damages, but shows a grant upon conditions which, if broken, create a forfeiture of the franchise, including cars, rails, ties, roadbed, and all things granted. (*Tower v. Tower etc. Street Ry. Co.*, 493.)

3. RAILWAYS — FORFEITURE OF FRANCHISE—NONUSER. If a city grants to a street railway company a franchise to construct, maintain, and operate a street railway on any and all of its streets for a period of twenty years, such railway to be propelled by horses, mules, steam, electric, or other motor "upon condition that the company faithfully fulfill the requirements herein expressed, and should the company fail herein or willfully abandon such road, and neglect, or refuse to operate it, then this franchise to become null and void, and the company agree that they will forfeit such road to the city of Tower in one year after said company cease to operate said road," the word "road" as here used has the same import as if it read "railroad"; and if said company, though insolvent, neglects, refuses, and ceases to operate its road for more than one year, it works an absolute forfeiture of its franchise, including its rails, ties, roadbed, and all things granted. (*Tower v. Tower etc. Street Ry. Co.*, 493.)

4. RAILROADS — DUTIES AND LIABILITIES TO PASSENGERS.—If a railroad company properly discharges, with due diligence, its duties toward its passengers, it is not liable to them for injuries arising from a cause over which the company has no control, or from the conduct or misconduct of the passenger to which the company does not contribute, or from the misconduct of the passenger, that being the primary cause. (*Wade v. Columbia Electric Street Ry. etc. Co.*, 676.)

5. RAILROADS — INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE.—If a passenger's injury, received in jumping from a car results from a rash misapprehension of danger which does not exist, and the injury sustained is attributable to rash con-

duct on his part, he cannot recover. (*Wade v. Columbia Electric Street Ry. etc. Co.*, 676.)

6. RAILROADS—MILEAGE TICKETS—DAMAGES FOR EJECTION OF PASSENGER.—If a person purchases a two thousand miles mileage railroad ticket, with the date of issue stamped thereon, and containing a margin punch which by mistake makes it expire on the day of issue instead of one year afterward as intended, and he subsequently presents his ticket in payment of his fare, and, upon its being refused, he refuses to otherwise pay his fare, and is thereupon ejected from the train, he is entitled to recover damages, although he has become a party to a contract printed on the ticket that it shall become void for passage after the date punched in the margin. (*Krueger v. Chicago, St. Paul etc. Ry. Co.*, 487.)

7. RAILROADS—MISTAKE IN MILEAGE TICKET.—If a person purchases a railroad ticket containing two thousand miles of passenger transportation, and it is limited, though by mistake, to expire on the day of issue, such limitation is necessarily void; and the purchaser is not compelled to stand upon the contract as written in the ticket, nor to have the mistake reformed in equity, before he can ride upon the ticket, and insist that the carrier shall perform it as it should have been written, or pay damages for a failure to do so. (*Krueger v. Chicago, St. Paul etc. Ry. Co.*, 487.)

8. RAILROADS—MISTAKE IN TICKET—EJECTION—RULE OF DAMAGES.—If a ticket presented by a passenger appears on its face to be void, he cannot increase his damages by refusing to leave the train, thus compelling his ejection by force, unless, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger. (*Krueger v. Chicago, St. Paul etc. Ry. Co.*, 487.)

9. RAILROADS—LIABILITY FOR ESCAPE OF ELECTRICITY.—Escape of electricity from a street railway, causing injury to a horse while being driven across the railway track, is presumptive proof of negligence in the operation of the railway. (*Trenton etc. Ry. Co. v. Cooper*, 592.)

10. RAILROADS—PRIVATE CROSSINGS—WARNING—REASONABLE CARE.—A statute requiring a locomotive bell to be rung or the whistle sounded before a railway train crosses a traveled road or street does not apply to private farm crossings; but it does not follow that a railway company never, under any circumstances, owes a duty to the adjacent landowner to give a signal or warning of an approaching train. It merely leaves the question to be determined on common-law principles, whether under the circumstances of the case, reasonable care would have required the giving of such warning. (*Czech v. Great Northern Ry. Co.*, 452.)

11. RAILROADS—PRIVATE CROSSINGS—WARNING—NEGLECT.—While there is no statutory obligation on a railroad company to give a signal of the approach of a train to a private crossing, yet the condition of the crossing as a peculiarly hazardous one, for any reason, coupled with the high rate of speed at which a train is running, may render the case one where reasonable care requires that some warning signal be given, and, in such case, the question of negligence on the part of the railway company in failing to give such warning is for the jury to determine. (*Czech v. Great Northern Ry. Co.*, 452.)

12. RAILROADS—FENCE LAW—INJURY TO CHILD.—A statute requiring a railway company to fence its road and to maintain

such fence, and providing that "it shall hereafter be liable for all damages sustained by any person in consequence of its failure or neglect to fence," imposes an absolute duty on the company to fence, and is not a mere fence law for animals, but is also a police regulation designed for the benefit of the public, and under it, the company is liable for injury inflicted by its train upon a young child, who, being non sul juris, strays upon the track, and is injured in consequence of the failure of the company to fence its road. (*Rosse v. St. Paul etc. Ry. Co.*, 472.)

13. RAILROADS—DUTY TO FENCE — CONSTRUCTION OF STATUTE.—The statute of Illinois, requiring railroad companies to fence their tracks and to erect cattle-guards, imposes an absolute duty, not only to protect the lives of animals, but also to protect human beings upon railroad trains, by keeping the track clear of obstructions. (*Terre Haute etc. Ry. Co. v. Williams*, 44.)

14. RAILROADS — FAILURE TO FENCE — CONSTRUCTION OF STATUTE—LIABILITY.—A provision in a statute requiring railroad companies to fence their tracks and to erect cattle-guards, that they shall be answerable for all damages to stock arising from a failure to perform such duty, does not exclude all other liability which may arise from such failure. (*Terre Haute etc. Ry. Co. v. Williams*, 44.)

15. RAILROADS — FAILURE TO FENCE — LIABILITY OF COMPANY FOR PERSONAL INJURIES.—If a railroad company fails to perform its absolute statutory duty to fence its track and to erect cattle-guards, and one of its employés, such as the engineer of a train, is injured, while in the exercise of due care, because of such failure, the company is answerable in damages. (*Terre Haute etc. Ry. Co. v. Williams*, 44.)

16. RAILROADS — FAILURE TO FENCE — LIABILITY OF COMPANY FOR PERSONAL INJURIES RESULTING IN DEATH.—If a railroad company fails to fence its track and to construct cattle-guards as required by law, and a train is derailed at a highway crossing, in consequence of such failure, by striking cattle which have strayed upon the track, the company is answerable for the death of the engineer, caused by such collision, where he did not have notice of the absence of fences and cattle-guards and was not negligent in running his train. (*Terre Haute etc. Ry. Co. v. Williams*, 44.)

17. EVIDENCE OF A FIRE BURNING BESIDE A RAILROAD TRACK soon after a locomotive had passed is admissible to prove its capacity to set fires, though the witness does not know how the fire caught, nor how long it had been burning. The weight of the evidence is for the jury. (*Dunning v. Maine Central R. R. Co.*, 208.)

18. NEGLIGENCE — EVIDENCE OF OTHER FIRES COMMUNICATED BY THE DEFENDANT'S LOCOMOTIVE.—In an action to recover damages suffered by fire, which the plaintiff claims was set by a particular locomotive belonging to the defendant, evidence may be received tending to prove that, about the time of the fire in question and in the same vicinity, locomotives of the defendant caused fire by emitting sparks, cinders, or coal, and that fires were seen in the immediate vicinity of the track after the passage of the defendant's locomotives. The fact that the engine to which the injury is attributed is identified does not render such evidence inadmissible. (*Dunning v. Maine Central R. R. Co.*, 208.)

19. MASTER AND SERVANT.—THE DUTIES WHICH A RAILWAY CORPORATION OWES to a conductor and train crew are to provide reasonably safe and suitable machinery and appliances for the business, including the exercise of reasonable care in furnishing

such appliances and the exercise of like care in keeping the same in repair and making proper inspections and tests, to exercise like care in providing and retaining sufficient and suitable servants for the conduct of the business and to establish proper rules and regulations for the service, and, having adopted such, to conform to them. (Norfolk etc. R. R. Co. v. Houchins, 791.)

20. MASTER AND SERVANT—INSPECTION OF APPLIANCES—MASTER'S DUTY.—A railroad company is not excused from the duty of discovering the defective condition of a cracked drawbar, in the absence of any evidence that the situation was such as to excuse such failure. (Chicago etc. Ry. Co. v. Gillison, 117.)

21. MASTER AND SERVANT—FELLOW-SERVANTS.—A CONDUCTOR OF A RAILWAY TRAIN and the crew acting under his direction are fellow-servants. Hence the latter cannot recover of the common master for injuries received through the negligence of the conductor in operating or moving his train. (Norfolk etc. R. R. Co. v. Houchins, 791.)

22. MASTER AND SERVANT—RAILROAD TRAIN—COMBINED NEGLIGENCE OF MASTER AND FELLOW-SERVANT—INJURY CAUSED BY DEFECTIVE DRAWBAR—MASTER'S LIABILITY.—If a railroad train breaks in two by reason of a defect in a drawbar, which might have been discovered by inspection, and the brakeman, upon discovering the separation, signals the engineer to go ahead and boards the rear section to set brakes, in obedience to the company's rules to make every effort, in such cases, to stop the rear section and to get the head section out of the way so as to avoid a collision, but is knocked from the train by a collision between the two sections, and injured, he may recover of the company, although his fellow-servant, the engineer, contributed to the injury by not keeping the forward section out of the way. (Chicago etc. Ry. Co. v. Gillison, 117.)

23. MASTER AND SERVANT—ASSUMPTION OF RISK—DEFECTIVE DRAWBARS.—A railroad brakeman does not assume the risk of injury arising from defective drawbars. (Chicago etc. Ry. Co. v. Gillison, 117.)

24. MASTER AND SERVANT—NOTICE AND ASSUMPTION OF RISK BY RAILROAD ENGINEER—FENCES AND CATTLE GUARDS.—An engineer of a railroad company is not chargeable with notice that the company has neglected to fence its track, in an unincorporated village, and to construct cattle-guards at a highway crossing therein, from the fact that he has passed through the village, several times a week, for a number of years, in running over the road. He cannot, therefore, be held to have assumed the increased risk. (Terre Haute etc. Ry. Co. v. Williams, 44.)

25. MASTER AND SERVANT—NOTICE AND ASSUMPTION OF RISK BY RAILROAD ENGINEER—FENCES AND CATTLE GUARDS.—There is nothing in the nature or character of the duties of a railroad engineer which would direct his attention to the fences or cattle-guards along the line of the road. He is not, therefore, required to know their condition, and has a right to assume that the railroad company has discharged its duty concerning them. (Terre Haute etc. Ry. Co. v. Williams, 44.)

26. EVIDENCE AS TO CONDITION OF BRAKES ON STREET-CARS—ADMISSIBILITY OF.—In an action against a street railway company to recover damages for personal injuries caused by its negligence in failing to stop a car, evidence as to the condition of brakes on the car at times before the injury is admissible, where it is shown that such condition remained unchanged

down to the time of the accident. (Rockford City Ry. Co. v. Blake, 122.)

27. EVIDENCE—BROKEN DRAWBAR—ADMISSIBILITY.—If a railroad train breaks in two, the lapse of two hours between the breaking and an examination, by a witness, of the broken drawbar does not preclude him from testifying that he found it broken off, that the upper part of the break was bright and new, and that the lower half was old and rusty. (Chicago etc. Ry. Co. v. Gillison, 117.)

28. EVIDENCE—STREET RAILWAYS—INADMISSIBILITY OF ORDINANCE UPON QUESTION OF NEGLIGENCE.—A city ordinance requiring street-cars to be stopped to avoid injury to any person on or near the track, upon the appearance of danger, is inadmissible in an action against a street railway company for injuries received by the plaintiff in being thrown under a passing car while attempting to hold a frightened horse. (Rockford City Ry. Co. v. Blake, 122.)

29. STREET RAILWAYS.—A PASSENGER RIDING ON THE PLATFORM OF A STREET RAILWAY CAR takes upon himself the duty to look out for and to protect himself against the usual and obvious perils attendant on his position, such as, for instance, the danger of being thrown from the platform by the jolting or swinging of the car. (Watson v. Portland etc. Ry. Co., 268.)

30. STREET RAILWAYS—NEGLIGENCE—RIDING ON THE PLATFORM OF A STREET-CAR.—It is not true, as a proposition of law, that one riding on the platform of a street railway car, propelled by horses or electricity, is guilty of contributory negligence, precluding his recovery for injuries sustained by him by being thrown from such platform while rounding a curve. (Watson v. Portland etc. Ry. Co., 268.)

31. A STREET RAILWAY CORPORATION WHICH MAINTAINS A PLACE ON THE LINE OF ITS ROAD for exhibitions, advertising them on its cars and admitting its patrons free, and employing a manager to furnish and maintain exhibitions and entertainments, is answerable to a spectator receiving injury while attending an exhibition, if it is in its nature such that it will necessarily or probably cause injury to persons present unless guarded against, and the railway corporation fails to exercise due care to prevent harm. Therefore, if the exhibition is of marksmanship, and a spectator is hit in the eye by a fragment of a bullet or other metallic substance flying from an impact wherein the bullet hits the butt, the sufferer may recover, if the evidence tends to show that the accident happened from a cause which might have been prevented and which ought to have been foreseen and guarded against by somebody. The spectator cannot be held to have assumed the risk of injury. (Thompson v. Lowell etc. Street Ry. Co., 323.)

See Adverse Possession, 2; Corporations, 1; Highways, 2; Injunction, 1, 2; Municipal Corporations, 12-18, 20, 21.

RATIFICATION.

See Usury.

REAL PROPERTY.

1. REAL PROPERTY.—PETROLEUM OIL, in its place, in the land, is a part of the land itself, just as are coal, timber, and iron. (Williamson v. Jones, 891.)

2. PERSONAL PROPERTY—UNLAWFUL SEVERANCE FROM REALTY—OWNERSHIP.—When that which is a part of the

realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance. (Williamson v. Jones, 891.)

3. PERSONAL PROPERTY—PETROLEUM OIL—UNLAWFUL REMOVAL FROM EARTH—OWNERSHIP.—Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it. (Williamson v. Jones, 891.)

4. REAL PROPERTY — ALLOWANCE FOR IMPROVEMENTS.—Under the statute of West Virginia one is entitled to compensation for permanent improvements placed by him on another's land if he put them there at a time when he believed his own title to be good. (Williamson v. Jones, 891.)

5. REAL PROPERTY—COMPENSATION FOR IMPROVEMENTS.—One is not ordinarily entitled to compensation for permanent improvements placed by him on another's land, if, when making them, he had notice, actual or constructive, of the superior right of another; neither is he entitled, at law, to such compensation, where he has notice of facts rendering his title defective, but, by mistake of law, regards it as good. (Williamson v. Jones, 891.)

6. RENTS AND PROFITS—IMPROVEMENTS.—IN AN ACCOUNT for rents and profits, where one has made permanent improvements upon the land of another, the improver must be charged for the property in its condition before his improvements, and not with the profits of his improvements. (Williamson v. Jones, 891.)

RENTS AND PROFITS.

See Real Property, 6; Waste, 5, 6.

RECEIVERS.

1. RECEIVERS.—THE OBJECT OF APPOINTING a receiver is to preserve the property for the benefit of all parties interested, and this object is sometimes best attained by continuing a business, which will be done where the interests of all parties will be best preserved by doing so. (Knickerbocker v. McKindley Coal etc. Co., 54.)

2. RECEIVERS—EXPENSES OF CONTINUING BUSINESS—HOW CHARGEABLE.—The necessary expenses of keeping a business, in the hands of a receiver, a "going concern" must be charged first upon the net income, but, if that is not sufficient, they may be charged upon the corpus of the property, or upon its proceeds after sale. (Knickerbocker v. McKindley Coal etc. Co., 54.)

3. RECEIVERS—KEEPING BUSINESS A "GOING CONCERN"—CASES IN WHICH IT MAY BE DONE.—Although the authority of a receiver to incur indebtedness, in order to keep the business a "going concern" until the rights of the parties are adjusted and a sale is effected, ordinarily arises only in cases of railroad companies, yet the same rules may be applied in other cases under like circumstances. (Knickerbocker v. McKindley Coal etc. Co., 54.)

4. RECEIVERS—CARING FOR PROPERTY—NECESSARY EXPENSES.—When a court of equity takes charge of property through a receiver, it becomes chargeable with the necessary expenses incurred in preserving it, and the court has the right to keep the property under its control until such expenses have been paid or secured. (Knickerbocker v. McKindley Coal etc. Co., 54.)

5. RECEIVERS—DECREE—TAKING PROPERTY SUBJECT TO CHARGE.—If property is in the hands of a receiver, one who

acquires it under the final decree of the court takes it cum onere, chargeable with amounts due to the receiver for necessary expenses. (*Knickerbocker v. McKindley Coal etc. Co.*, 54.)

6. RECEIVERS—CLAIMS AGAINST—WHEN PURCHASERS ARE ESTOPPED TO QUESTION.—If hotel property and furniture, in the hands of a receiver, are sold under foreclosure proceedings, and the court orders him to turn it over to the purchasers, but an appeal is taken from such order, and, pending the appeal, the purchasers consent to the receiver's retaining the property and keeping the business a "going concern," they are estopped from denying the validity of claims against the receiver for coal and groceries furnished for that purpose. (*Knickerbocker v. McKindley Coal etc. Co.*, 54.)

7. RECEIVERS—PURCHASE, ON FORECLOSURE, BY THE MORTGAGOR'S PERSONAL REPRESENTATIVES—EFFECT OF.—If property in the hands of a receiver is sold under the foreclosure of a deed of trust, and is bought by the personal representative of the party who created the indebtedness which occasioned the receivership, such purchase amounts merely to a payment of the indebtedness, leaving the property in their hands subject to the charge of the receivership expenses. (*Knickerbocker v. McKindley Coal etc. Co.*, 54.)

RES GESTAE.

See Evidence, 2, 3.

REWARDS.

THE OFFER OF A REWARD for the arrest and conviction of the person or persons who committed a designated crime is complied with and the reward earned by obtaining and giving to some interested person sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender; and subsequently to procure his conviction by a court of competent jurisdiction. Hence, it is no defense to an action for such reward that the plaintiff did not arrest the criminal, if plaintiff discovered facts and circumstances tending strongly to inculcate the person who thereupon, being confronted with the charge by the plaintiff, made a full confession of his guilt, and afterward pleaded guilty to the indictment found against him. (*Haskell v. Davidson*, 254.)

RIGHT OF WAY.

See Adverse Possession, 2.

SALES.

1. SALE—ESTOPPEL TO DENY THAT TITLE PASSED BY. One who sells goods with knowledge that they are to be put on sale is estopped, as against an innocent purchaser, from claiming that the sale was conditional and that the title had not passed. (*Lewenberg v. Hayes*, 215.)

2. SALES — IMPLIED WARRANTY — PARTICULAR PURPOSE.—If a person agrees to sell bricks of a certain grade, equal to sample sent, but no sample is agreed upon or sent, and the bricks are accepted without reference to sample, the contract must be construed as calling for bricks of a well-known kind or description. Hence, there is no implied warranty that the bricks are fit for a particular purpose, and the purchaser, having accepted and retained them, is answerable for the reasonable value thereof. (*Wisconsin etc. Brick Co. v. Hood*, 418.)

3. SALES—LATENT DEFECT—CONTRACTOR'S LIABILITY.
 If there is a latent defect in bricks sold, caused by unfit clay, and not discoverable by the exercise of care and skill in inspecting the brick after they are manufactured, and a contractor, in good faith and without knowledge of the defect, buys the bricks and uses them in constructing a building, which is accepted by the owner, the contractor is without fault, though the defect in the bricks is subsequently developed by their exposure to the weather. The contractor is not, therefore, answerable to the owner for the latent defect, and the owner cannot recoup against him the amount of damage to the building caused by such defect. (*Wisconsin etc. Brick Co. v. Hood*, 418.)

SEAL.

See Corporations, 6.

SEARCH OF PRISONER.

See Arrest, 1, 2; Criminal Law, 2; Execution, 2-4.

SET-OFF.

See Building and Loan Associations, 12; Waste, 6.

SLOT-MACHINES.

See Gaming; Statutes, 14.

SPECIAL VERDICT.

See Insurance, 35.

STATUTE OF FRAUDS.

See Judicial Sales, 5; Pleading, 1.

STATUTES OF LIMITATION.

See Limitations of Actions.

STATUTES.

1. STATUTES—CONSTRUCTION—WHAT MAY BE CONSIDERED.—To ascertain the true spirit and import of an act, a court may consider the mischief it was designed to remedy. (*Bobel v. People*, 64.)

2. STATUTES—CONSTITUTIONALITY—DUTY OF COURT TO PASS UPON.—Under a constitution which imposes on the judiciary the duty of deciding the constitutionality of a law, without limitation, a court must inquire into that question whenever it is properly presented for its consideration. (*Price v. Moundsville*, 878.)

3. CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER.—A statute which attempts to delegate to a board of library trustees appointed by a mayor with the consent of the city council, the absolute power to fix the amount of taxes to be raised for library purposes is unconstitutional and void as a delegation of the taxing power, without the consent of the people, to a body of persons not elected by, nor immediately responsible to, the people. (*State v. Mayor etc. of Des Moines*, 157.)

4. STATUTES—VALIDITY—CLERICAL DEFECTS.—A law is not vitiated by a defect in a legislative journal which is shown, on the face thereof, to be clerical in its nature. (*Price v. Moundsville*, 878.)

5. STATUTES — VALIDITY — CLERICAL ERROR — SECOND READING.—To make a law unconstitutional on the ground that the legislature did not comply with the constitutional requirement as to reading a bill a second time, it must affirmatively appear from the legislative journal that this was not done. If it is apparent, from the journal, that there was a second reading, though not expressed in words, the act is not vitiated. (*Price v. Moundsville*, 878.)

6. STATUTES—GENERAL AND SPECIAL LAWS.—A general law, as distinguished from a special or local law, is a law that embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. The test of the generality of a law is that it shall embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. (*Wanser v. Hoos*, 600.)

7. STATUTES—LOCAL LAWS.—If a law is in terms local, satisfactory reasons must be found to exclude it from constitutional objections. That municipalities to which it applies have been properly classified for general municipal purposes does not of itself furnish a sufficient reason for sustaining such legislation. (*Wanser v. Hoos*, 600.)

8. STATUTES—GENERAL AND LOCAL LAWS.—The principle by which general laws are distinguished from either special or local laws applies to all legislation regulating the internal affairs of municipalities, and the discretion that enters into the decision of the question whether a particular law is general or local or special is that where the classification appears to rest on substantial grounds, and the line of demarcation which separates the places included from those excluded is a matter of judgment, the judgment of the legislature must prevail, unless it plainly appears that such classification is an evasion of constitutional requirements. (*Wanser v. Hoos*, 600.)

9. STATUTES—GENERAL AND LOCAL LAWS.—In every case the primary question in the process of determining whether a particular law, local or special on its face, is a general law in the sense of the constitution, is the consideration whether the classification adopted is based on those substantial grounds which justify the limitations of its enactment to one set of municipalities to the exclusion of others. No question of legislative discretion can possibly arise until this preliminary question is solved. (*Wanser v. Hoos*, 600.)

10. STATUTES—LOCAL LAW—CONSTRUCTION.—A statute providing that all municipal officers in cities of the first class shall be elected at the annual election of state and county officers, and upon the same official ballots as the latter, relates neither to the machinery, structure, or powers of municipal government, and, as no substantial grounds appear therefrom for a discrimination between cities of the first class and cities of other classes in respect to such legislation, such law is local and special within the meaning of the constitution prohibiting such legislation. Population is not a legitimate basis of classification for the purpose of such legislation. (*Wanser v. Hoos*, 600.)

11. STATUTES—SUFFICIENCY OF TITLE—CONSTRUCTION. If there is doubt as to whether the subject of an act is clearly expressed in its title, the doubt should be resolved in favor of the validity of the act. (*Bobel v. People*, 64.)

12. STATUTES — SUFFICIENCY OF TITLE, THOUGH CHANGED.—If the original title of a bill is sufficient, the legislature does not vitiate the legislation by rendering the title more specific during the progress of enactment, when the object of the bill is not thereby essentially changed. (*Price v. Moundsville*, 878.)

13. STATUTES—SUFFICIENCY OF TITLE.—Under a constitutional provision requiring the subject of an act to be expressed in its title, the title of an act is sufficient if all provisions of the act relate to the one subject indicated in the title, and are parts of it or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the act shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. (*Bobel v. People*, 64.)

14. STATUTES—SUFFICIENCY OF TITLE—ACT PROHIBITING "USE" OF SLOT MACHINES.—An act entitled, "An act to prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes," and which prohibits the "keeping" of such devices, is not unconstitutional on the ground that the subject of the act is not expressed in its title. (*Bobel v. People*, 64.)

See Banks and Banking, 4; Boards of Health; Burglary, 4; Criminal Law, 1; Husband and Wife, 2; Infants, 2; Innkeepers, 2; Insurance, 1; Interstate Commerce, 5; Judgment, 20, 23; Liens; Municipal Corporations, 1, 7-9; Railroad Companies, 10, 12-15.

SUPERSEDEAS.

See Executions, 8.

SURETYSHIP.

1. SURETYSHIP—ADMISSIONS OF PRINCIPAL AS EVIDENCE.—Admissions made by a principal in the course of the performance of the business for which his surety is bound are admissible against the latter as part of the *res gestae*. (*Lancashire Ins. Co. v. Callahan*, 475.)

2. SURETYSHIP—NOTICE OF DISHONESTY.—In case of a continuing suretyship for the faithful discharge of his duties by a servant or agent, notice by letter from the principal to such servant or agent that the latter is in arrears in his accounts and derelict in not making his reports, but not suggesting moral turpitude, want of integrity, or dishonesty on the part of the servant or agent, is not sufficient to discharge the surety from liability for a subsequently discovered defalcation by such servant, who was continued in the service after such notice had been given, without the assent of the surety. (*Lancashire Ins. Co. v. Callahan*, 475.)

3. SURETYSHIP—NOTICE OF DISHONESTY.—If there is a continuing suretyship for the faithful discharge of his duties by a servant, and the master discovers that the servant has been guilty of dishonesty in the course of the service, and thereafter continues him in such service, without notice to and the assent of the surety, express or implied, the latter is not liable for any loss arising from the dishonesty of the servant during his subsequent service, but this rule has no application to mere breaches of duty or contract obligations on the part of the servant not involving dishonesty on his part, or fraud or concealment on the part of the master. (*Lancashire Ins. Co. v. Callahan*, 475.)

4. DEBTOR AND CREDITOR—FRAUDULENT COMPOSITIONS—RELEASE OF SURETIES.—A security given by a surety for a debtor in a general composition settlement with creditors is voidable on the ground of fraud, if there is with the knowledge or consent of the creditor, such a misrepresentation to, or concealment from the surety, of the transaction between the creditor and his debtor that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into,

the extent of the surety's liability might be thereby increased. (Powers Dry Goods Co. v. Harlin, 460.)

See Negotiable Instruments, 16.

SURFACE WATERS.

See Husband and Wife, 5; Municipal Corporations, 33, 34.

TAXES.

1. **TAXES.—THE PROPERTY OF MUNICIPAL CORPORATIONS** is subject to taxation unless there is a law exempting it. (Sanitary District v. Martin, 110.)

2. **TAXES—EXEMPTION—CONSTRUCTION OF STATUTE.** Tax exemption statutes are strictly construed, whether the property is owned by a private person or a municipal corporation, and all reasonable intendments are indulged in favor of the state policy, which is to restrict rather than extend exemptions from taxation. (Sanitary District v. Martin, 110.)

3. **TAXES.—THE WORDS, "PUBLIC GROUNDS,"** used in a statute exempting such grounds from taxation, refer to such grounds only as are open for the designated use to the general public. (Sanitary District v. Martin, 110.)

4. **TAXES -- EXEMPTION.—LANDS ACQUIRED BY THE SANITARY DISTRICT OF CHICAGO,** outside of such district, and used as a channel to carry off and render innocuous the sewage of the district, principally of the city of Chicago, so that the waters of Lake Michigan, from which its inhabitants obtain their water supply, may not be contaminated thereby, are the property of the district, which is a municipal corporation, and not of the state, and the public, outside the limits of the district, have no interest in them. They are, therefore, not exempt from taxation either as state property or as "public grounds." (Sanitary District v. Chicago, 110.)

See Legislature; Mortgage, 12, 13; Municipal Corporations, 7; Statutes, 3.

TORT.

See Actions, 2.

TRESPASS.

PLEADING—TRESPASS OR CASE.—Possession alone is sufficient to maintain trespass or case against a wrongdoer. (Clay v. St. Albans, 883.)

TRIAL.

1. **TRIAL—WHAT EVIDENCE MAY BE EXCLUDED.**—It is not error to exclude evidence which does not tend to enlighten the jury upon any question of fact in issue. (Hartford Deposit Co. v. Sollitt, 35.)

2. **PRACTICE.—IT IS IMMATERIAL ERROR** to rule out evidence offered by defendant to prove a fact already admitted by the plaintiff. (Greenville v. Ormand, 663.)

3. **EVIDENCE. ADMISSION OF TO PROVE CONCEDED FACTS.**—A litigant cannot prevent the introduction of relevant evidence against him by admitting, in general terms, the fact which such evidence tends to prove, if the presiding judge, in his discretion, thinks proper to receive it. (Dunning v. Maine Central R. R. Co., 208.)

4. **EVIDENCE LEGAL FOR SOME PURPOSE** cannot be excluded because the jury may erroneously apply it otherwise. Pro-

tection may be had in such case by requesting a precautionary instruction. (Trenton etc. Ry. Co. v. Cooper, 592.)

5. EVIDENCE CANNOT BE EXCLUDED from the jury because it is shown to be either inconsistent or inaccurate. It is for the jury to determine, in view of all the testimony, whether the witness was credible and reliable. (Dunning v. Maine Central R. R. Co., 208.)

6. THE LAW OF ANOTHER STATE IS A FACT TO BE PROVED, like any other fact, by evidence. If the evidence consists of a single statute or a decision the language of which is not in dispute, the interpretation of it presents a question of law for the court; but if the law must be determined by construing numerous decisions, more or less conflicting, or bearing upon the subject collaterally or by way of analogy, from which inferences must be drawn, the question to be determined is one of fact and not of law. (Wylie v. Cotter, 305.)

7. LAWS OF ANOTHER STATE.—THE INTERPRETATION AND EFFECT OF A STATUTE OF ANOTHER STATE, which has been offered in evidence, are for the court alone. (Union etc. Ins. Co. v. Pollard, 715.)

8. TRIAL—PLEA OF FORMER JUDGMENT.—It is error to submit a plea of former judgment on the same cause of action, in bar of the plaintiff's suit, to a jury. It must be tried by the court from an inspection of the record. (Davis v. Trump, 849.)

TROVER.

1. THE MEASURE OF DAMAGES IN AN ACTION OF TROVER is the value of the property at the time of conversion, with interest. (Wing v. Milliken, 238.)

2. TROVER—CONVERSION BY AN AGENT.—One who exercises a dominion over personal property in exclusion or defiance of, or inconsistent with, the owner's right, is guilty of a conversion, whether he acted for himself or for another. (Wing v. Milliken, 238.)

3. TROVER—MEASURE OF DAMAGES WHERE THE VALUE OF PROPERTY HAS BEEN ENHANCED BY THE WRONGDOER.—Where timber is cut by a wrongdoer and subsequently carried away, the owner is not restricted in his damages to the value of the timber before it was cut, but may, in an action of trover, recover its value at the time and in the condition in which it was carried away. (Wing v. Milliken, 238.)

See Agency, 2.

TRUST DEEDS.

See Mortgage, 2; Negotiable Instruments, 9; Trusts.

TRUSTS.

1. TRUST NOT PERFECTED IN THE MODE ATTEMPTED. If a deed shows an intention to create a trust in a particular manner in which, however, it cannot operate, no intention can be presumed that it should operate in some other manner, and it must hence be adjudged void. (Loring v. Hildreth, 301.)

2. TRUSTS, VOLUNTARY, WHEN NOT CREATED.—If, after the death of the holder of certificates of deposit, they are found among her papers, together with directions in her handwriting for their disposition by certain persons as trustees in case she does not dispose of them before her decease, but neither the trustees nor the beneficiaries were informed of the proposed trust, no trust is cre-

ated. A voluntary trust of which the settler has attempted to make himself the trustee, where he has kept the property in his hands subject to his own disposal, and never informed the beneficiaries, cannot be supported. (*Welch v. Henshaw*, 309.)

3. TRUST DEED NOT DELIVERED NOR ACCEPTED.—A deed executed by the grantor and placed on record by him and purporting to convey the property therein described upon certain trusts, but never delivered to, nor accepted by, the grantee, is wholly inoperative either as a conveyance of the title or as a declaration of trust. (*Loring v. Hildreth*, 301.)

4. DEED OF TRUST—UNAUTHORIZED RELEASE BY A TRUSTEE.—If a note to secure which a deed of trust was given is transferred to a bona fide holder, a release thereafter executed by the trustee and the original payee of the note is without authority and void, and cannot protect a subsequent purchaser of the property having no notice of the transfer of the note before the execution of the release. (*Borgess Investment Co. v. Vette*, 567.)

5. WILLS—TRUST WITHOUT A KNOWN BENEFICIARY.—If a trust is created by a will, but the beneficiary cannot be discovered from the will itself, the trustee holds for the benefit of the heirs at law or distributees of the testator. (*Sims v. Sims*, 772.)

6. WILLS—TRUST, THE TERMS OF WHICH ARE NOT DISCLOSED.—A bequest to W. B. S., "to be disposed of by him as a private trust, about which I shall give him special verbal instructions, but if my afflicted son, J. B. S., who is now an inmate of a lunatic asylum, should die before my death," the legacy to be revoked and the property disposed of as otherwise directed in the will, creates a trust in favor of J. B. S., giving him an absolute equitable estate, which trust cannot be limited or controlled by evidence of parol instructions given by the testator to the trustee. (*Sims v. Sims*, 772.)

7. TRUSTS—CONVERSION BY TRUSTEE—REPUDIATION—ACCEPTANCE—ESTOPPEL.—If trustees convert a trust property, a cestui que trust has a right to confirm the conversion, and accept the fund in its converted form, or repudiate it and take the original property; but he cannot do both, and must make an election. His acceptance of the property, in a converted form, estops him from afterward demanding the original property. (*Buford v. Adair*, 854.)

8. TRUSTS—JUDGMENT AGAINST TRUSTEE.—A trustee cannot, by giving a judgment bond in a matter in which the trust estate is not interested, create a liability against it, and, if judgment is entered on such bond, an injunction to prevent the sale of the trust property thereunder should be issued at the instance of one of the beneficiaries of the trust. (*Williams v. Tozer*, 650.)

9. TRUSTS—COBENEFICIARIES—TRUST RELATIONS BETWEEN.—If a trust is created for the joint benefit of two persons, whereby it is the duty of the trustee to pay to each, during life, one-half of the income of the trust property, one of the beneficiaries cannot secure to himself any advantage over the other by reason of his superior or exclusive knowledge of a fact which both are interested to know. Hence, if one, finding the trustee in an embarrassed financial condition, procures him to settle and pay over one-half of such income, such payment cannot be held for his sole benefit, but he must account to his cobeneficiary, or to a new trustee, for all moneys or securities received as the result of such settlement. (*Du Plaine's Estate*, 651.)

See Charities, 1, 2; Cloud on Title; Gift, 1.

UMPIRE.

See Arbitration and Award, 1-4.

UNDUE INFLUENCE.

See Wills, 6, 7.

USURY.

1. **USURY—BURDEN OF PROOF.**—One alleging usury has the burden of proof, and the fact must be established by a preponderance of the evidence. (*Abbott v. Stone*, 60.)

2. **USURY—PLACE OF CONTRACT.**—If a corporation, organized and doing business in one state, loans money in another and there receives a note secured by a mortgage on property situate therein, and the note stipulates that the principal and interest shall be payable to the corporation at its office in the state of its residence, the contract is a contract of such state, and is not usurious where the rate of interest is not forbidden by its laws, though in excess of that permitted by the laws of the state where the note and mortgage were made and where the land is situated. The fact that the corporation had an office in the latter state, where payment of interest or of principal could have been made, is immaterial. (*Ware v. Bankers' Loan etc. Co.*, 826.)

3. **USURY—CONFLICT OF LAWS.**—If a contract is made in one state, to be performed therein, an agreement to take and receive interest, and to construe the contract in this respect by the laws of another state allowing a higher rate of interest, cannot be enforced in the latter state. (*Pollock v. Carolina etc. B. & L. Assn.*, 683.)

4. **USURY—EXTENSION OF TIME TO PAY NOTE.**—A note not originally usurious is not made so by a subsequent agreement to extend the time of payment, although such agreement is in consideration of a payment of, or a promise to pay, usurious interest. (*Morse v. Wellcome*, 471.)

5. **USURY—INTEREST NOTES OR COUPONS.**—Usury is not established by the fact that interest notes or coupons, drawing interest after maturity, are attached to a promissory note. (*Abbott v. Stone*, 60.)

6. **USURY—COMMISSION FOR LOAN.**—Usury is not established by mere proof of the fact that a sum of money was paid by the borrower as a commission for procuring the loan. (*Abbott v. Stone*, 60.)

7. **USURY—PROVISION FOR SOLICITOR'S FEE ON FORECLOSURE.**—Usury is not established by the fact that a trust deed, in the nature of a mortgage, provides that a certain per cent of the principal, interest, and costs shall be allowed as a solicitor's fee, upon foreclosure. (*Abbott v. Stone*, 60.)

8. **USURY—APPLICATION OF PAYMENTS.**—Under the statutes of Virginia, if payments have been made upon a bond in which usurious interest has been reserved, and the borrower himself applies the payment to the interest or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless, within one year thereafter, suit is instituted by the borrower or a suit is brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued. (*Crabtree v. Old Dominion B. & L. Assn.*, 818.)

9. **USURY—RELIEF FROM.**—Where usury is established, the measure of relief, whether the question is presented at law or in equity, is that the lender may recover only the principal sum. (*Greer v. Hale*, 814.)

10. **USURY—AGENCY—RATIFICATION.**—Notes given a wife are usurious, where her husband acts as her agent in loaning the money on such terms as he chooses, and he adds to the amount of

such notes, in excess of the money loaned, a certain sum as his commission, which, together with the interest stipulated for, makes the interest exceed the lawful rate, and the wife ratifies the notes by demanding a recovery of the whole amount. (*McNeely v. Ford*, 195.)

See Building and Loan Association, 1, 6-9.

VARIANCE.

See Appeal, 14; Husband and Wife, 5; Larceny, 3.

VENDOR AND PURCHASER.

See Executions, 1.

WAIVER.

See Arbitration and Award, 3; Insurance, 4, 8; Witnesses, 2.

WAREHOUSEMEN.

1. **WAREHOUSEMEN—LIABILITY FOR LOSS BY ACT OF GOD—NEGLIGENCE.**—A warehouseman, whose warehouse is caused to sink by a phenomenal and unprecedented rise in a river, is not liable for damage thereby caused to goods stored therein, unless he is guilty of negligence directly contributing to such loss, for the reason that it is caused by an act of God. (*American Brewing Assn. v. Talbot*, 538.)

2. **WAREHOUSEMEN—NEGLIGENCE—BURDEN OF PROOF.** When a bailor proves the delivery of goods to a warehouseman for storage under a contract for hire, and a failure to redeliver on demand, he makes a prima facie case of negligence, but when the warehouseman has proved that the goods were lost by the act of God, the burden shifts to the bailor to establish that the loss or damage was due to the want of ordinary diligence and care in taking care of the goods. (*American Brewing Assn. v. Talbot*, 538.)

See Police Power, 3-5.

WASTE.

1. **WASTE—TRESPASS—DISTINCTION.**—Waste is an injury to the freehold, by one rightfully in possession, such as a cotenant. This marks the distinction between waste and trespass, but the act, whether done by a cotenant or stranger, is a wrong, for which an injured cotenant may have redress. (*Williamson v. Jones*, 891.)

2. **WASTE—TENANT FOR LIFE—TENANT IN COMMON.**—Those acts which would be waste in a tenant for life would be waste between tenants in common. (*Williamson v. Jones*, 891.)

3. **WASTE—EQUITY HAS JURISDICTION**, at the instance of remaindermen, of an injunction to restrain waste committed by a life tenant, or by a tenant in common with them, and may take an account therefor and give compensation for damages. Having jurisdiction for one purpose, it will go on to do complete justice to avoid multiplicity of suits. (*Williamson v. Jones*, 891.)

4. **WASTE—INTEREST ON PROCEEDS—RIGHT TO.**—If a life tenant commits waste by taking petroleum oil from the land, without authority, he is not entitled to the oil, and has no right to the income of interest from its proceeds during the existence of the life estate. Such proceeds go at once to the owners of the next vested estate of inheritance, or remaindermen. (*Williamson v. Jones*, 891.)

5. **WASTE—ACCOUNTING—PROPER BASIS OF—RENTS AND PROFITS.**—If one in possession of a tract of land, claiming

exclusive ownership, but who owns only a part thereof, and who is a life tenant of the remainder, extracts petroleum oil therefrom, without authority, and converts it to his own use, he must account therefor, not simply for an annual rental, but on the basis of net rents and profits. The remaindermen are entitled to recover the money he actually received for the oil, if ascertainable; if not, its value. (*Williamson v. Jones*, 891.)

6. WASTE—CREDIT, IN EQUITY, AGAINST RENTS AND PROFITS—EXPENSES OF PRODUCING OIL—SETOFF.—In an action by remaindermen against a life tenant for waste in extracting oil from the land without authority, the plaintiffs must do equity if they ask equity. Hence, if by reason of the energy and risk of the life tenant, he has developed the hitherto worthless land into an oil field of almost amazing wealth, it is not inconsistent for a court of equity to allow him, as a setoff against rents and profits, all costs of producing the oil, including the cost of boring productive wells, for, by the natural law, it is not right that anyone should grow rich by the detriment and injury of another. (*Williamson v. Jones*, 891.)

7. WASTE—TENANT IN COMMON.—THE EXTRACTION OF PETROLEUM OIL from land, by a tenant in common, without authority, is waste, for which he is answerable to his cotenants to the extent of their right in the land. (*Williamson v. Jones*, 891.)

8. WASTE—LIFE TENANT.—THE EXTRACTION OF PETROLEUM OIL from land, by a life tenant, without authority, is waste, for which he is answerable to the reversloner or remainderman. (*Williamson v. Jones*, 891.)

9. WASTE—LIFE TENANT—BORING FOR OIL—MINING.—The offense of waste consists in the first penetration and opening of the soil, as in boring for oil, but it is not waste to dig in mines or pits already open, for an open mine may be worked even to exhaustion by the life tenant. (*Williamson v. Jones*, 891.)

WILLS.

1. WILLS.—A CONDITION THAT A LEGATEE ATTEMPTING TO SET ASIDE THE WILL, or any part thereof, or to cause litigation over it, shall forfeit his legacy, and it shall revert to the estate, is in terrorem and inoperative, when there is no gift over on the breach of the condition. (*Fifield v. Van Wyck*, 745.)

2. WILLS.—PAROL EVIDENCE OF DIRECTIONS OR INSTRUCTIONS OF THE TESTATOR referred to, but not incorporated in, a will is not admissible to show what such instructions were. (*Sims v. Sims*, 772.)

3. WILLS—ESTOPPEL TO CONTEST—WHEN DOES NOT RESULT FROM ACCEPTING A LEGACY.—An heir at law who accepts a legacy with full knowledge of the facts is not thereby estopped from attacking a residuary clause in the will, where its provisions are not of a character to require an election to be made, and the will does not attempt to dispose of any property right of such legatee. (*Fifield v. Van Wyck*, 745.)

4. WILLS.—WHERE A WILL IS CONTESTED ON TWO GROUNDS, and the jury find in favor of the contestants, but it cannot be told upon which ground, the verdict must be set aside, if there was a failure of proof upon either ground. (*Cash v. Lust*, 576.)

5. WILLS—COST OF CONTEST.—The contestant of a will cannot be required to give security for the costs as a condition to prosecuting such contest. (*Cash v. Lust*, 576.)

6. WILLS.—UNDUE INFLUENCE on the part of two sons over their father, such as must invalidate his will, is not established by evidence showing that they had almost entire control over his business, and that he was unwilling to do anything respecting it without their presence and their advice, that they advised against the marriage of one of their sisters, and the father thereafter opposed it, where it appears that these two sons were not present at the execution of the will and obtained no special advantage by it, except that they profited equally with five other children from his practically disinheriting his two remaining children, and the father, when making the will, stated the reason why he did not divide the property equally among all his children. (*Cash v. Lust*, 576.)

7. WILLS.—BURDEN OF PROOF.—One who claims that a will was the result of undue influence exerted on the mind of the testator must satisfy the jury, by substantial evidence, that the will was the product of such influence. (*Cash v. Lust*, 576.)

8. WILLS.—THE TEST OF COMPETENCY is only that the testator understood the business about which he was engaged when he had his will prepared and executed, knew the persons who were the natural objects of his bounty and understood his relation to them, and knew what property he had and the disposition he desired to make of it. (*Cash v. Lust*, 576.)

9. WILLS.—WANT OF TESTAMENTARY CAPACITY on the part of a testator is not established by evidence showing that when his will was made he was eighty years of age, of violent temper and passions and strong prejudices, that his health was bad, that he developed a mania for praying and prayed respecting the will in question, that he professed to have had a communication from Jesus Christ during the year the will was executed, that he abruptly changed subjects in conversation, and often, after talking a little, broke down and cried like a child over real or fancied reverses, where it is also proved that he attended to his business until his death, and, in doing so, exhibited average mental capacity. (*Cash v. Lust*, 576.)

10. CONVERSION OF REALTY INTO PERSONALTY BY A WILL.—Though executors are directed to sell real property and convert it into money, and actually make such sale, the proceeds are not thereby converted into personalty, if the purpose for which the sale was directed to be made is one not permitted by law. Therefore, the moneys so realized belong to the heir at law. (*Field v. Van Wyck*, 745.)

11. CONVERSION OF REALTY INTO PERSONALTY.—A power of sale given to executors to enable them to divide the property among testator's children does not convert real into personal property, unless his will shows his intention, not only to convert real estate into personal for the purposes of the will, but also to give the product of the sale as personalty at all events and whether the purpose takes effect or not. Where the purposes of a conversion have utterly failed, the property will devolve according to its original character. (*Rudy's Estate*, 654.)

12. PERPETUITIES.—GENERAL SCHEME OF THE TESTATOR.—If a part of the testator's general scheme is that an estate shall be kept entire for an unlawful period, no part of the scheme can be sustained, but the estate to which the void provisions relate vests immediately in the heir. (*Johnson's Estate*, 621.)

13. PERPETUITIES.—WILLS HAVING VALID AND INVALID PROVISIONS.—Where a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole instrument taken together, was evidently

never the intention of the testator, otherwise when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest. (Johnson's Estate, 621.)

See Devise; Judgment, 13; Legacies; Powers, 1; Trusts, 6.

WITNESSES.

1. WITNESSES — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.—If a person deeds his interest in land, with covenants of general warranty, to one who afterward becomes the plaintiff in a controversy over the property, the grantor is interested in the result of the suit, and is incompetent to testify as to any transactions or communications had with parties since deceased under whom the defendants claim title. (Buford v. Adair, 854.)

2. WITNESS—WAIVER OF INCOMPETENCY OF.—If a plaintiff takes the defendant's deposition in a case in which he is incompetent to testify, this is an irrevocable waiver of his incompetency, and he may be permitted to subsequently testify in his own behalf on the trial of the cause, whether the deposition is read in evidence or not. (Borgess Investment Co. v. Vette, 567.)

3. WITNESSES — OPINION AS TO VALUE OF PROPERTY.—In an action against a city for damages caused by its changing the grade of a street, the opinions of witnesses as to the value of the property, before and after the change, are admissible in evidence. (Blair v. Charleston, 837.)

See Bigamy, 4; Evidence, 12, 13.

WRIT OF ERROR.

See Executions, 8, 9.

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